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A TREATISE

ON THE

LIEN OF MECHANICS

AND

MATERIAL MEN,

In Pennsylvania,

WITH THE

ACTS OF ASSEMBLY RELATING THERETO,

AND VARIOUS

FORMS,

BY

HENRY J. SERGEANT, Esq.

Second Edition.

BY E. SPENCER MILLER.

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BROOMALL

PREFACE TO THE SECOND EDITION.

I HAVE consented to edit this volume, at the request of the Author, and, under the assurance, that a new edition was needed by the profession. Since the original treatise was published, most important changes have been made in the subject of Mechanics' liens, both by legislation and decision; and it is no longer safe to rely upon its pages, without a constant reference to the statute books, and the reports. Such a reference has now become so burdensome, that any one, who, with ordinary care, has collected the cases and Acts of Assembly, under proper heads, must have conferred a favour. I have endeavoured to do this; and only claim the credit of a desire to be clear and accurate.

The book has grown under my hands, as I advanced, to a greater size than I expected. So much new matter has been introduced, that but little of the text of the first publication remains. It is, really, a different treatise; not because of any desire to depart from the plan of the first edition, but because the subject,

BROOMALL

itself, has become so altered and extended, that it requires a new consideration and a new arrangement.

I sincerely hope, that this volume may, not only, be useful to the profession, but lead to system and harmony in the decisions. The subject of which it treats is now involved in the most deplorable confusion. The desire so often, and so clearly expressed by the court to encourage the mechanic to file his own claims, by protecting him from his blunders, has led to such loose and discordant judgment, that we are almost without law upon many of its most important topics. The full extent of the difficulty which has thus arisen, can only appear, when the cases are collated.

We can see no reason why this class of citizens should be indulged at the expense of others. Why is the mechanic to be more favoured than other lien creditors? The reasoning and policy of the law are most cogent against him. His lien is statutory and extraordinary. It is *exparte;* more entirely so than that of a mortgagee, whose claim is liquidated, only under the hand of the debtor, while this may be filed for more than is due. It is most dangerous in its relation back to a period not easily ascertained, and not appearing of record. Such claims ought to be held to strict construction, by every principle of justice.

But is it indulgence and protection? If mechanics and material men knew their own interests, they would be far from availing themselves of their so

called privilege. If the sums lost by the false economy which risks the debt to save a fee could be ascertained, they would be startled by the result. A large proportion of all the claims filed are utterly worthless. Only one who, representing his client before an Auditor, appointed to distribute the proceeds of a sheriff's sale, has seen a host of threatening liens disappear, under the plainest requirements of the law, can judge of the folly of such a course.

I am doing my profession no favour by these suggestions. It reaps, perhaps, a larger income under the present system, than it would, were the remarks which we have made regarded. The mechanic pays more to support bad claims, than he would for the filing of good ones. But I am doing the law a service. By deference to false policies it has been perverted, until titles are endangered, confusion encouraged, courts delayed, and a system produced which is, now, about as bad as it can be.

Since the foregoing preface was written, a letter of some interest has been placed in my hands, containing the result of investigation made by the writer, now deceased, at the request of the person to whom it is addressed. At his suggestion I add, here, the larger part of its contents. I have not been able to verify them by reference to the proper volumes, but give them in the shape in which they come to me. In a subsequent edition I hope to be able to pursue further

the inquiries to which they lead. If they had been in my hands at an earlier period, they would have served, perhaps, to add largely to the first chapter of this work, which is their proper place.

Philadelphia, December 26th, 1849.

Dear Sir,—At your request I have looked in the French law respecting the right of lien which builders and material men have on buildings erected by them. I find this lien exists by virtue of art. 2103, of the Code Civil, § 4. The way to secure the lien is peculiar; the owner of the ground is required to apply to the court to appoint viewers (experts) who go upon the ground and make a *procès verbal*, which is an inquisition of office, in which are stated all the circumstances and state of the ground which the owner intends to improve, and also of the proposed improvement. On the application of the owner the (expert) viewer comes before the judge, and in the presence of the owner makes oath that the facts contained in the procès verbal are true. The procès verbal is then filed in the office of the court, before whom the proceedings have taken place. In this proceeding it is unnecessary to designate the persons who are to be employed in making the projected improvements. A transcript of this procès verbal is then filed in the lien office, (bureau des hypothèques) of the district where the proposed building is located.

Though this proceeding does not alone create a lien, yet it is indispensable to secure the workmen and material men. When this is regular, they may with safety go on with their work and furnish materials.

Within six months after the work has been completed, either the owner or any of the creditors may apply by petition to the same court, and another viewer is named. All parties interested must be notified to appear at a certain time and place, when the oath is to be tendered to the viewer, and then,

if any good reasons exist, he may be challenged. The object of this second view is to cause the works to be received juridically. The viewer then goes and examines the work that has been done, the materials which have been furnished, and to put a proper value on them: when that is ascertained by the contract, then it is that value; when it is not so ascertained, then he estimates the work or materials at their just value; the bills and claims of each being attached to the procès verbal. The expert also reports as to the goodness and substantiality of the works. The procès verbal is then deposited in the office. A transcript of this is made within the term, and filed in the lien office. The lien is then complete, and its efficacy commences with filing of the first procès verbal. See Merlin Rep. Privilege, art. 3, § 4; Dalloz, Dict. Privilege, art. 3, § 4; Le Page, Lois des Batimens, partie 2, c. 1, art. 4, § 4.

The Civil Code of Louisiana, art. 3216, contains a provision similar to that of the French Code.

The old French law gave a lien to workmen and material men over all other creditors, upon the equitable principle that they who had furnished materials and had worked the common benefit of all the creditors, ought therefore to be first paid. Pothier, Procédure Civile, partie 4, c. 2, s. 3, § 5.

Both the old and the new French law give a lien for repairs as well as for new buildings, provided the law have been complied with.

Hillyard's Abridgment, chap. 40, contains the law relating to the lien of Mechanics and material men, in thirteen different states.

P. S.—Since I closed this letter, I find the Romans gave a lien not only to the man who repaired or rebuilt a house, but also to one who lent money for that purpose. Nov. 97, c. 3; Code 8, 18; Code 8, 10, 2; Dig. 20, 2, 1.

PREFACE TO THE FIRST EDITION.

It is hoped, that this Treatise, though it may fail to supply the want of a work on the subject of which it treats, may serve as a reference to the decisions under the various Acts of Assembly relating to the Liens of Mechanics and Material men. It embraces all the decisions on this subject to which the writer has had access. Being doubtful, how far the Act of June 1836 agreed with, or supplied the prior Acts on the subject, he has thought proper to introduce the latter, as well as the decisions under them. It will be noticed, however, that there is one county, at least, embraced by some of the prior Acts, and to which the Act of 1836 has not been extended. The Acts prior to that of 1836 will, whether supplied by that Act or not, rule a great number of cases which are now pending, and may hereafter arise,—the proceedings in which commenced before that Act took effect. The Act of 1803, which was the first on this subject, and repealed by that of 1806, is also given, together with various Forms of Claims, suitable to Mechanics and Material men, in conformity to the provisions of the Act of 1836.

Philadelphia, October, 1839.

CONTENTS.

PART I.

OF THE ORIGIN AND HISTORY, CONSTRUCTION AND LOCAL EXTENT OF THE LAW.

CHAPTER I.

OF THE ORIGIN AND HISTORY OF THE LAW, - - - 33

CHAPTER II.

OF THE CONSTRUCTION OF THE LAW, - - - - - 37

CHAPTER III.

OF THE LOCAL EXTENT OF THE LAW, - - - - - - 48

PART II.

OF THE CASES TO WHICH THE LAW APPLIES.

CHAPTER I.

WHO MAY HAVE THE LIEN, - - - - - - - 57

CHAPTER II.

OF THE NATURE OF THE DEBT SECURED BY THE LIEN, - - 83

CHAPTER III.

WHO MAY PLEDGE THE CREDIT OF THE BUILDING, - - 125

PART III.

OF THE SUBJECT OF THE LIEN.

CHAPTER I.

OF THE SUBJECT OF THE LIEN, AS RESPECTS ITS NATURE, - 131

CHAPTER II.

OF THE SUBJECT OF THE LIEN IN RESPECT OF ITS EXTENT, 135

CHAPTER III.

OF THE SUBJECT OF THE LIEN WITH REFERENCE TO THE ESTATE, - - - - - 150

PART IV.

OF THE NATURE AND EFFECT OF THE DISCHARGE OF THE LIEN.

CHAPTER I.

GENERAL REMARKS ON THE LIEN, - - - - - - 163

CHAPTER II.

OF THE COMMENCEMENT OF THE LIEN, - - - - - 166

CHAPTER III.

OF THE CONTINUANCE OF THE LIEN, - - - - - 172

CHAPTER IV.

OF THE POSITION AND PRIORITY OF THE LIEN, - - - 184

CHAPTER V.

OF THE DISCHARGE OF THE LIEN, - - - - - - 188

PART V.

OF THE JURISDICTION OF COURTS AND PRACTICE UNDER THE LAW.

CHAPTER I.

GENERAL REMARKS UPON THE PROCEEDING, - - - 200

CHAPTER II.

OF THE JURISDICTION OF COURTS, - - - - - - 202

CHAPTER III.

OF THE PARTIES TO THE PROCEEDING, - - - - - 204

CHAPTER IV.

OF THE CLAIM, - - - - - - - - - - 219

CHAPTER V.

OF JOINT, APPORTIONED CLAIMS, - - - - - - 249

CHAPTER VI.

OF STRIKING OFF CLAIMS, - - - - - - - 260

CHAPTER VII.

OF THE SCIRE FACIAS AND ITS SERVICE, - - - - - 262

CHAPTER VIII.

OF COMPELLING THE CLAIMANT TO PROCEED, - - - - 267

CHAPTER IX.

OF COMING IN BY SUGGESTION, - - - - - - - 270

CHAPTER X.

OF THE JUDGMENT FOR WANT OF AN AFFIDAVIT OF DEFENCE, 272

CHAPTER XI.

OF THE PLEADINGS, - - - - - - - - - 274

CHAPTER XII.

OF THE EVIDENCE, - - - - - - - - - - 279

CHAPTER XIII.

LAW AND FACT, - - - - - - - - - - 295

CHAPTER XIV.

OF THE VERDICT AND JUDGMENT, - - - - - - 297

CHAPTER XV.

OF THE EXECUTION AND SALE, AND THEIR EFFECT, - - 299

CHAPTER XVI.

OF THE DISTRIBUTION OF THE PROCEEDS, - - - - - 304

CHAPTER XVII.

OF COSTS, - - - - - - - - - - - 310

CHAPTER XVIII.

OF THE PERSONAL REMEDY, - - - - - - - 312

APPENDIX.

ACTS OF ASSEMBLY.

Act of April 1, 1803, - - - - - - - 317
Act of March 17, 1806, - - - - - - - 318
Act of March 28, 1808, - - - - - - 319
Act of January 21, 1813, - - - - - - - 321
Act of March 1, 1815, - - - - - - - 321
Act of March 22, 1817, - - - - - - - 322
Act of March 24, 1818, - - - - - - 322
Act of March 7, 1821, - - - - - - - 323
Act of April 11, 1825, - - - - - - 324
Act of April 10, 1826, - - - - - - - 324
Act of April 16, 1827, - - - - - - 325
Act of February 4, 1830, - - - - - - - 325
Act of January 28, 1831, - - - - - - 326
Act of March 30, 1831, - - - - - - - 326
Act of March 30, 1831, - - - - - - 327
Act of May 7, 1832, - - - - - - - 328
Act of April 11, 1835, - - - - - - 329
Act of April 13, 1835, - - - - - - - 329
Act of April 1, 1836, - - - - - - - 330
Act of June 16, 1836, - - - - - - - 330
Act of April 4, 1837, - - - - - - - 342
Act of April 16, 1838, - - - - - - - 343
Act of April 16, 1840, - - - - - - 344
Act of April 28, 1840, - - - - - - - 344
Act of March 19, 1841, - - - - - - 344
Act of April 6, 1841, - - - - - - - 345
Act of February 10, 1842, - - - - - - 345
Act of March 25, 1842, - - - - - - - 346
Act of March 30, 1842, - - - - - - 346
Act of August 2, 1842, - - - - - - - 346
Act of April 5, 1843, - - - - - - - 346
Act of April 24, 1843, - - - - - - - 347
Act of March 19, 1844, - - - - - - 347
Act of May 6, 1844, - - - - - - - 347
Act of April 16, 1845, - - - - - - 348

Act of March 11, 1846, - - - - - - - 348
Act of April 13, 1846, - - - - - - 348
Act of April 10, 1848, - - - - - - - 349
Act of January 23, 1849, - - - - - - 350
Act of March 24, 1849, - - - - - - - 350
Act of April 9, 1849, - - - - - - - 351
Act of April 25, 1850, - - - - - - - 351
Act of April 26, 1850, - - - - - - 352
Act of April 21, 1854, - - - - - - - 352
Act of April 14, 1855, - - - - - - 353
Act of April 26, 1855, - - - - - - - 353
Act of April 21, 1856, - - - - - - 354

FORMS.

I. The several claims, - - - - - - 355
II. The joint apportioned claim, - - - - - 358
III. The scire facias, - - - - - - - 359
IV. Petition under the 23rd section of the Act of 1836, 360
V. Form of the rule on the above petition, - - - 360
VI. Order of the court upon the above petition, - 361
VII. Plaintiff's statement under said order, - - - 361
VIII. Defendant's allegations in defence under said order, 631
IX. Entry of the suggestion under the 19th section, - 362
X. The levari facias, - - - - - 362

TABLE OF CASES.

Abercrombie, Holdship *v.*, 89, 90, 92, 129, 137, 154.
Allen, Killingsworth *v.*, 100, 245.
Allison, Presbyterian Church *v.*, 84, 111, 119, 176, 292, 295, 296.
American Fire Ins. Co. *v.* Pringle, 166, 168.
Anshutz *v.* M'Clelland, 84, 90, 92, 151, 200, 210, 212, 216, 217, 297, 301, 306, 308.
Anshutz, Walker *v.*, 94.
Armstrong *v.* Ware, 84, 101, 106, 109, 110, 296.
Arthurs, Morgan *v.*, 84, 96.
Atkinson *v.* Graves, 249.

Babb *v.* Reed, 59, 70, 84.
Baily, M'Adam *v.*, 217.
Barclay's Appeal, 85, 97, 99, 100, 245.
Barker *v.* Maxwell, 205.
Barnes, Shaw *v.*, 38, 232, 241, 245, 260, 298.
Barnes *v.* Wright, 76, 77, 128, 151.
Barras, Ewing *v.*, 38, 244, 276, 296.
Bartlett *v.* Kingan, 176, 274.
Bayer *v.* Reeside, 226, 232, 236, 260, 274, 277, 298.
Bayne *v.* Gaylord, 297.
Beam *v.* First Meth. Ep. Church, 84, 146.
Beau, Leib *v.*, 169, 184, 297, 301.
Bell, Weakley *v.*, 193.
Bickel *v.* James, 90, 128, 129, 136, 151, 160, 220, 303.
Bilyeau, Gaule *v.*, 85, 93, 100, 161.
Black's Appeal, 224, 263.
Boden, Jobson *v.*, 76, 80, 84.

Bolton, Johns *v.*, 124, 175, 177, 189, 192.
Borton *v.* Morris, 268.
Borton *v.* Johns, 34, 37, 47, 66, 68, 123, 264, 274, 276, 277.
Boudinot, Carson *v.*, 61.
Boudinot, Steinmetz *v.*, 41, 60, 61, 123, 125, 151, 220.
Bournonville *v.* Goodall, 179, 246, 248, 278.
Breban *v.* Evans, 293.
Broom, Hampton *v.*, 84, 205, 210.
Brown, Kelly *v.*, 246, 284, 285.
Brown *v.* Smith, 136.
Bruner *v.* Sheik, 84, 130, 159, 213.
Buchanan, Kinsley *v.*, 189, 192.
Burling's Estate, 38, 103.
Burr, Haines *v.*, 239.
Burt *v.* Kurtz, 97, 182.

Calhoun *v.* Mahon, 38, 235.
Campbell *v.* Furness, 258.
Campbell *v.* Scaife, 74, 125, 277, 280.
Carson *v.* Boudinot, 61.
Cattanach *v.* Ingersoll, 283.
Chambers, Woodruff *v.*, 203.
Chambers *v.* Yarnall, 171, 179, 246, 276.
Chambers *v.* Young, 256.
Christine *v.* Manderson, 205, 210, 217, 275.
Church *v.* Allison, 84, 111, 119, 176, 292, 295, 296.
Church, Davis *v.*, 86, 222, 246, 275.
Church *v.* Davis, 41, 86, 284, 285.
Church, Dickinson College *v.*, 84, 284, 285, 287, 290, 292, 295.
Church *v.* College, 84, 292.
Church *v.* Griffith, 84, 87, 92, 93, 160.
Cobb *v.* Traquair, 76, 77.
College, Church *v.*, 84, 292.
Commissioners The, Wilson *v.*, 86.
Conrad, Harker *v.*, 112, 119, 176, 193, 205, 241, 243, 295.
Conrad, Hopkins *v.*, 197, 276.
Controllers The, Williams *v.*, 86.
Cornelius *v.* Uhler, 180.
Coryell, Croskey *v.*, 84, 121, 288.
Crean *v.* M'Fee, 189.

Croskey *v.* Coryell, 84, 121, 288.
Curry *v.* Spink, 203.

Dalton Christman and Co's. Appeal, 176.
Dalzell *v.* Lynch, 88.
Davis, Church *v.*, 41, 86, 284, 285.
Davis *v.* Church, 86, 222, 246, 275.
Davis *v.* Farr, 255.
Davis *v.* Stratton, 208, 213.
Deal, Matlack *v.*, 200, 297, 310.
Derrickson *v.* Nagle, 126.
Dickinson College *v.* Church, 84, 284, 285, 287, 290, 292, 295.
Donahoo *v.* Scott, 235, 246, 254, 266.
Douglass, Gorgas *v.*, 214, 249, 301.
Driesbach *v.* Keller, 38, 102, 104, 107, 172, 236, 237, 277, 295.
Ducomb, Lysle *v.*, 184.
Dugan, Richebaugh *v.*, 209, 235, 274, 278, 293.
Duncan, Phillips *v.*, 173, 174, 175, 177.

Eastwick, M'Call *v.*, 121, 124.
Ellice *v.* Paul, 239.
Elliott, Hills *v.*, 117, 120, 280, 284.
Elliott, Knorr *v.*, 181.
Evans *v.* Breban, 293.
Evans, Mitchell *v.*, 84, 184.
Evans *v.* Montgomery, 43, 160.
Evans *v.* Springer, 41.
Ewing *v.* Barras, 38, 244, 276, 296.

Farr, Davis *v.*, 255.
Ferguson *v.* Vollum, 298.
First Methodist Episcopal Church, Beam *v.*, 84, 146.
Flanigan, O'Neil *v.*, 175.
Flanigan, Yearsley *v.*, 84, 176, 177, 183, 295.
Freeman *v.* Gilpin, 115, 117.
Fritz, Noyes *v.*, 271.
Furness, Campbell *v.*, 258.

Gabell *v.* Parry, 193, 277, 278.
Gaul *v.* Bilyeau, 85, 93, 100, 161.

Gaylord, Bayne *v.*, 297.
Gilbert Hill's Estate, 104, 174, 225, 242, 293.
Gilbert, M'Mullin *v.*, 284.
Gilpin, Freeman *v.*, 115, 117.
Goodall, Bournonville *v.*, 179, 246, 248, 278.
Gorgas *v.* Douglass, 214, 249, 301.
Graham, Hinchman *v.*, 119, 120, 286, 288.
Graves, Atkinson *v.*, 249.
Gray *v.* Holdship, 84, 96.
Griffith, Church *v.*, 84, 87, 92, 93, 160.

Haines *v.* Burr, 239.
Haley *v.* Prosser, 78, 122, 123, 124, 277.
Hampton *v.* Broom, 84, 205, 210, 263, 264.
Harbert, Wetherill *v.*, 188.
Harker *v.* Conrad, 112, 119, 176, 193, 205, 241, 243, 295.
Hauer's Appeal, 306.
Haviland *v.* Pratt, 40, 122, 124, 248, 282.
Haworth *v.* Wallace, 92, 158, 277, 293.
Hays *v.* Tryon, 41, 179, 207.
Hern *v.* Hopkins, 167, 169, 179.
Heron *v.* Robinson, 227.
Herron, M'Clelland *v.*, 84, 92, 158.
Hess, Ridgway *v.*, 274.
Heugh, Thorn *v.*, 226, 227, 282.
Hill *v.* M'Dowell, 236, 248, 274, 276, 281, 282.
Hill, Whelan *v.*, 197.
Hill *v.* Witmer, 190.
Hillary *v.* Pollock, 236, 281, 295.
Hills *v.* Elliott, 117, 120, 174, 280, 284.
Hill's Estate, Gilbert *v.*, 104, 174, 225, 242, 293.
Hinchman *v.* Graham, 119, 120, 286, 288.
Hinchman *v.* Lybrand, 121, 124.
Hoatz *v.* Patterson, 63, 78, 79, 84, 97, 127.
Holden *v.* Winslow, 84, 112, 172, 177, 200, 293, 296, 297.
Holdship *v.* Abercrombie, 89, 90, 92, 129, 137, 154.
Holdship, Gray *v.*, 84, 96.
Hoops *v.* Parsons, 179.
Hoover, Pennock *v.*, 138, 167, 171, 179, 252, 254, 256, 257.
Hopkins *v.* Conrad, 197, 276.

Hopkins, Hern *v.*, 167, 169, 179.
Howard *v.* M'Kowen, 262, 274.
Howett, In re, 99, 106.
Hoy, Matlack *v.*, 41, 299.
Hull, Shaffer *v.*, 121, 176, 238, 242.
Hurley *v.* Lybrand, 113, 114.

Ingersoll, Cattanach *v.*, 283.

Jackson, Keppel *v.*, 84, 147, 241, 296, 307.
James, Bickel *v.*, 90, 128, 129, 136, 151, 160, 220, 303.
James, Thomas *v.*, 40, 185, 218.
Jobson *v.* Boden, 76, 80, 84.
Johns, Bolton *v.*, 34, 37, 47, 66, 68, 123, 264, 274, 276, 277.
Johns *v.* Bolton, 124, 175, 177, 189, 192.
Johns, Sullivan *v.*, 209, 214.
Jones, Savoy and Salter *v.*, 78, 81, 128, 150, 151, 153, 154, 157, 158, 159, 206.
Jones *v.* Shawan, 34, 61, 63, 69, 94, 125, 127, 189, 209, 212, 215, 237, 263, 281, 282, 293.

Keller, Driesbach *v.*, 38, 102, 164, 107, 172, 236, 237, 277, 295.
Kelly *v.* Brown, 246, 284, 285.
Keppel *v.* Jackson, 84, 147, 241, 296, 307.
Keyser, Springer *v.*, 241, 243.
Killingsworth *v.* Allen, 100, 245.
Kingan, Bartlett *v.*, 176, 274, 295.
Kinsley *v.* Buchanan, 189, 192.
Kline *v.* Lewis, 151, 197.
Klingler, Rogers *v.*, 208, 220.
Knabb's Appeal, 38, 208, 218, 222, 224, 225, 233, 234, 242, 306.
Knorr *v.* Elliott, 181.
Kurtz, Burt *v.*, 97, 182.

Landis' Appeal, 99, 106.
Large *v.* Millette, 71.
Lauck's Appeal, 186.
Lauman's Appeal, 97, 100, 185, 218, 226, 246, 259.
Leaming, Stiles *v.*, 239.
Lehman *v.* Thomas, 229, 260, 274.

Leib *v.* Bean, 169, 184, 297, 301.
Lemar *v.* Miles, 87.
Lewis, Kline *v.*, 151, 197.
Lewis *v.* Morgan, 179, 190, 278.
Lindall, M'Donald *v.*, 84, 140, 141, 149, 240, 246.
Logan, O'Brien *v.*, 45, 124, 239, 277.
Lybrand, Hinchman *v.*, 121, 124.
Lybrand, Hurley *v.*, 113, 114.
Lybrand, Rowley *v.*, 113.
Lyman, Young *v.*, 124, 239, 292.
Lynch, Dalzell *v.*, 88.
Lyons *v.* M'Guffey, 161, 184.
Lysle *v.* Ducomb, 184.

Mahon, Calhoun *v.*, 38, 235.
Manderson, Christine *v.*, 205, 210, 217, 275.
Masser, Odd Fellows' Hall *v.*, 199, 245, 280, 283, 291, 293.
Matlack *v.* Deal, 200, 297, 310.
Matlack *v.* Hoy, 41, 299.
Maxwell, Barker *v.*, 205.
M'Adam *v.* Baily, 217.
M'Call *v.* Eastwick, 121, 124.
M'Clelland, Anshutz *v.*, 84, 90, 92, 151, 200, 210, 212, 216, 217, 297, 301, 306, 308.
M'Clelland *v.* Herron, 84, 92, 158.
M'Donald *v.* Lindall, 84, 140, 141, 149, 240, 246.
M'Dowell, Hill *v.*, 236, 248, 274, 276, 281, 282.
M'Fee, Crean *v.*, 189.
M'Gittigan, Sweeney *v.*, 182.
M'Glaughlin *v.* Smith, 310.
M'Guffey, Lyons *v.*, 161, 184.
M'Ilhenny *v.* Pratt, 138.
M'Kowen, Howard *v.*, 262, 274.
M'Mullin *v.* Gilbert, 284.
M'Namee *v.* Stoever, 254.
Melchoir, Wallace *v.*, 119, 288.
Miles, Lemar *v.*, 87.
Miller *v.* Oliver, 106.
Miller, White *v.*, 34, 132, 288.
Millette, Large *v.*, 71.

Mitchell *v.* Evans, 84, 184.
Montgomery, Evans *v.*, 43, 160.
Montgomery, Taylor *v.*, 258.
Moore, Siner *v.*, 159.
Morgan *v.* Arthurs, 84, 96.
Morgan, Lewis *v.*, 179, 190, 278.
Morris, Borton *v.*, 268.
Murray, Simpson *v.*, 244, 282.
Mustin *v.* Vanhook, 41, 181.

Nagle, Derrickson *v.*, 126.
Nelson, Smith *v.*, 108, 109, 110, 296.
Noll *v.* Swineford, 84, 212, 226, 231, 232, 263.
Noyes *v.* Fritz, 271.

O'Brien *v.* Logan, 45, 124, 239, 277.
O'Connor *v.* Warner, 34, 45, 154, 160.
Odd Fellows' Hall *v.* Masser, 199, 245, 280, 283, 291, 293.
Oliver, Miller *v.*, 106.
Olympic Theatre, case of, 84, 96, 101, 103, 292.
O'Neil *v.* Flanigan, 175.

Parry, Gabell *v.*, 193, 277, 278.
Parsons, Hoops *v.*, 179.
Patterson, Hoatz *v.*, 63, 78, 79, 84, 97, 127.
Paul, Ellice *v.*, 239.
Pennock *v.* Hoover, 138, 167, 171, 179, 252, 254, 256, 257.
Perigo *v.* Vanhorn, 106, 109, 296.
Phillips *v.* Duncan, 173, 174, 177.
Pollock, Hillary *v.*, 236, 281, 295.
Pratt, Haviland *v.*, 40, 122, 124, 248, 282.
Pratt, M'Ilhenny *v.*, 138.
Presbyterian Church *v.* Allison, 84, 111, 119, 176, 292, 295, 296.
Pringle, American Fire Insurance Company *v.*, 166, 168.
Prosser, Haley *v.*, 78, 122, 123, 124, 277.

Reed, Babb *v.*, 59, 70, 84.
Reed, Richards *v.*, 273.
Reeside, Bayer *v.*, 226, 232, 236, 260, 274, 277, 298.
Rehrer *v.* Zeigler, 39, 231, 281.

Richards *v.* Reed, 273.
Richebaugh *v.* Dugan, 209, 235, 274, 278, 293.
Ridgway *v.* Hess, 274.
Rogers *v.* Klingler, 208, 220.
Rowley *v.* Lybrand, 113.
Russell, Washburn *v.*, 84, 243, 244.

Savoy and Salter *v.* Jones, 78, 81, 128, 150, 151, 153, 154, 157, 158, 159, 206.
Scaife, Campbell *v.*, 74, 125, 277, 280.
Scott, Donahoo *v.*, 235, 246, 254, 266.
Scott *v.* Senderling, 225.
Senderling, Scott *v.*, 225.
Shaffer *v.* Hull, 121, 176, 238, 242.
Sharpknack *v.* Wilson, 182.
Shaw *v.* Barnes, 38, 232, 241, 245, 260, 298.
Shawan, Jones *v.*, 34, 61, 63, 69, 94, 125, 127, 189, 209, 212, 215, 237, 263, 281, 282, 293.
Sheik, Bruner *v.*, 84, 130, 159, 213.
Simpson *v.* Murray, 244, 282.
Siner *v.* Moore, 159.
Smith, Brown *v.*, 136.
Smith, M'Glaughlin *v.*, 310.
Smith *v.* Nelson, 108, 109, 110, 296.
Spink, Curry *v.*, 203.
Springer, Evans *v.*, 41.
Springer *v.* Keyser, 241, 243.
Steinmetz *v.* Boudinot, 41, 60, 61, 123, 125, 151, 220.
Stetler, Third Associate Reformed Presbyterian Church *v.*, 199.
Stevenson *v.* Stonehill, 59, 169.
Stiles *v.* Leaming, 139.
Stoever, M'Namee *v.*, 254.
Stonehill, Stevenson *v.*, 59, 169.
Stratton, Davis *v.*, 208, 213.
Streeper, Walter *v.*, 268.
Sullivan *v.* Johns, 209, 214.
Sweeney *v.* M'Gittigan, 182.
Swineford, Noll *v.*, 84, 212, 226, 232, 231, 263.

Taylor *v.* Montgomery, 258.
Tearney, Williams *v.*, 180, 190.

Third Associate Reformed Presbyterian Church *v.* Stetler, 199.
Thomas *v.* James, 40, 185, 218, 305.
Thomas, Lehmann *v.*, 229, 260, 274.
Thompson's case, 189.
Thompson *v.* Ward, 249.
Thorn *v.* Heugh, 226, 227, 282.
Thorp, Wademan *v.*, 84, 96.
Tilford *v.* Wallace, 37, 49, 296.
Traquair, Cobb *v.*, 76, 77.
Tryon, Hays *v.*, 41, 179, 207.
Twelves *v.* Williams, 302.

Uhler, Cornelius *v.*, 180.

Vanderveer's case, 184.
Vanhook, Mustin *v.*, 41, 181.
Vanhorn, Perigo *v.*, 106, 109, 296.
Vollum, Fergusson *v.*, 298.

Wademan *v.* Thorp, 84, 96.
Walker *v.* Anshutz, 94.
Walker, Witman *v.*, 40, 68, 119, 127, 230, 233, 240.
Wallace, Haworth *v.*, 92, 158, 277, 293.
Wallace *v.* Melchoir, 119, 288.
Wallace, Tilford *v.*, 37, 49, 296.
Ward, Thompson *v.*, 249.
Walter *v.* Streeper, 268.
Ware, Armstrong *v.*, 84, 101, 106, 109, 110, 296.
Warner, O'Connor *v.*, 34, 45, 154, 160.
Washburn *v.* Russell, 84, 243, 244.
Weakley *v.* Bell, 193.
Werth *v.* Werth, 84, 85, 100, 138, 147, 187, 302.
Wetherill *v.* Harbert, 188.
Whelan *v.* Hill, 197.
White's Appeal, 84, 92.
White *v.* Miller, 34, 132, 288.
Williams *v.* The Controllers, 86.
Williams *v.* Tearney, 180, 190.
Williams, Twelves *v.*, 302.
Wilson, Sharpknack *v.*, 182.

Wilson *v.* The Commissioners, 86.
Winslow, Holden *v.*, 84, 112, 172, 177, 200, 293, 296, 297.
Witman *v.* Walker, 40, 68, 119, 127, 230, 233, 240.
Witmer, Hill *v.*, 190.
Woodruff *v.* Chambers, 203.
Wright, Barnes *v.*, 76, 77, 128, 151, 208, 263.

Yarnall, Chambers *v.*, 171, 179, 246, 276.
Yearsley *v.* Flanigan, 84, 176, 177, 183, 295.
Young, Chambers *v.*, 256.
Young *v.* Lyman, 124, 239, 292.

Zeigler, Rehrer *v.*, 39, 231, 281.

ERRATA.

Page 99, note 2, for "Howell" read "Howett."

Pages 161 and 184, for "M'Gaffey," read "M'Guffey."

Page 217, 5th line, instead of "contract was made, or the work done, or materials furnished," read "building was commenced."

Page 219, for "Chapter III" read Chapter IV.

PART I.

OF THE ORIGIN AND HISTORY, CONSTRUCTION AND LOCAL EXTENT OF THE LAW.

CHAPTER I.

OF THE ORIGIN AND HISTORY OF THE LAW.

"The Acts of Assembly giving a specific lien on buildings for work done, and materials furnished for them, established a system for which no precedent existed in our own or the English law. The only previous instance of a character at all similar, is to be found in the Act of 1784, relating to persons employed in building and repairing vessels, the subject matter of which, however, differs, in some obvious points, from that of the Act of 1806, although the phraseology of the former has been followed in some passages."[1]

The precise history of the movement that led to the passage of the first act does not now clearly appear. Its origin must, therefore, be doubtfully ex-

[1] Explanatory remarks of the Commissioners to revise the civil code.

plained from such casual remarks as we can glean from the cases. "Our legislature for almost forty years," says Ch. J. Gibson, in the year 1842, "breathed one uniform spirit of kindness to the operative." "The manifestation of its former kindness is visible in the enlargement of the system so as to embrace ships and even curbstones, and in the gradual diffusion of it over almost the whole state."[1]

The same judge remarks, in another of his decisions; "It was the frequency of loss sustained by mechanics and dealers, in consequence of the employment" of the middleman or contractor "which first induced the legislature to give them a lien on the building."[2]

A perfect system could hardly have resulted, at once, from such an effort. "It is not surprising, therefore," say the Commissioners, whose language we have already quoted, "that defects have been discovered in the acts in question, nor that great difficulties have been experienced by the courts and the bar, in giving effect to the design of the legislature."[3]

The earlier provisions were, indeed, meager and unsatisfactory. As the judge just referred to remarks, in one of his decisions; "By reason of the novelty of the subject it happened that the first act fell short of the object."[4] And in another, "The adaptation of these lien laws was imperfect, and they worked ill for the owner at first."[5] In the earlier Acts the requisitions as to the form of the claim were few and illy con-

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[1] O'Conner *v.* Warner, 4 W. & S. 226. [2] Bolton *v.* Johns, 5 B. 150.
[3] Explanatory remarks, &c. [4] Jones *v.* Shawan, 4 W. & S. 264.
[5] White *v.* Miller, 6 H. 54.

sidered, the nature of the remedy was but vaguely indicated, the mode of continuing the lien was doubtful, and when continued it remained perpetual. These defects were aided from time to time, by enactments, which, however, still continued to lack system and completeness. But the Act of 1836, which was at length passed almost as it came from the hands of the commissioners, left but little, as far as the legislature was concerned, to be desired. It is, with its supplements, the foundation of the present system.

There have been two periods of interest in the history of the law, a mention of which we do not feel at liberty to omit, even in this brief sketch.

It had been frequently decided, from the origin of the system, that the lien was one which, without reference, as a general rule, to the particular estate of the person in possession, bound the fee simple in the land. This result was considered important for the safety of the mechanic, and clearly within the design of the legislature. By an Act of 1840 these decisions were swept away, and the lien restricted to the estate of the person in possession at the commencement of the building. The cases to which we shall refer hereafter will show how sensibly this revolution was felt in the system, and how soon it led to grave questions of construction and constitutional law.

The other change was less radical, but of importance. It had been held by the courts that the person called in the Act the contractor, was not within its provisions, and could not file a claim. Decision went so far, at length, that no person who had made

a special contract could obtain the lien. These cases, also, were rendered nugatory by an Act of 1845, and the existence of a special contract appears to be no longer in the way of a claim.

"The policy of the system has been, often and seriously, questioned, and doubts have been, frequently, expressed, whether, upon the whole, it works well, even for those for whose benefit it was enacted, since it tends to clog the transfer of real estate, by the risk in which it involves purchasers and mortgagees. The example set by this state, however, has been followed in some others, and, recently, by Congress, in relation to the District of Columbia, by the adoption, in the same words, of the Acts of 1806 and 1808. Public opinion, also, seems favourable to a continuance of the system, since the lien, which, by the Act of 1806, was confined to the city and county of Philadelphia, has, by successive Acts, been extended to thirty-nine counties, besides several boroughs or towns."

These remarks were made in 1836. Since that period many other counties have been brought within the provisions of the law, which extends, now, over by far the larger portion of the state.

BRUMBACK

CHAPTER II.

OF THE CONSTRUCTION OF THE LAW.

It will appear, from what has been already said, that the remedy given by these Acts is novel and extraordinary, and purely statutory in its character. This consideration has, in many of the decisions, weighed with the court in construing their provisions.

Thus in a case of comparatively early date, the court say: "A lien for work and materials on the building is a privilege derived entirely from statutory provision, and cannot be maintained beyond the extent of the grant by Act of Assembly."[1] And later, "A mechanic's lien depends on no principle of moral right, but on positive enactment, of which it is the creature, and beyond the terms of which it cannot be extended."[2]

But these *dicta*, must, in view of other decisions, be limited to those aspects of the question of construction which result from efforts to extend its application to new localities, as in the first case, or to new debts, or new subjects.

In most of the instances in which the necessity of strict compliance with the requisitions of the Acts, as to form in procedure, has been the point before the court, its language has been very different.

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[1] Tilford *v.* Wallace, 3 W. 143. [2] Bolton *v.* Johns, 5 B. 149.

Thus, in the Court of Common Pleas of the County of Philadelphia, King, J., said: "This Act of Assembly ought to receive a liberal construction in favour of the meritorious class of citizens, the just claims of whose industry it is intended to secure."[1]

And the Supreme Court, in later years, has used similar language: "Accuracy ought to be carefully attended to; but as claims are frequently filed by the material men, themselves, it would lead to injustice to hold, that every mistake, however trifling, should avoid the lien. Only such as are calculated to mislead subsequent purchasers or creditors should destroy the claim. The object which the legislature has in view is attained, by setting forth on the record such matters as will leave no reasonable room to doubt the particular building intended, against which the claim is filed. And, for this purpose, certainty to a common intent is all that can be reasonably required."[2]

In other decisions we find, indeed, a little more guard and measure in the expression of the court upon this point. Thus, Bell, J., says:—"It has been felt, that the extraordinary remedy afforded by our laws to mechanics and material men, requires to be properly guarded, to prevent it from becoming a source of unjust annoyance and injury to those whose property is liable to be made the subject of its action. It has, accordingly, from time to time, at-

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[1] Burling's Est., 1 Ash. 377.

[2] Ewing *v.* Barras, 4 W. & S. 468. See also, Shaw *v.* Barnes, 5 B. 21. Calhoun *v.* Mahon, 2 H. 58. Knabb's Ap., 10 B. 188. Driesbach *v.* Keller, 7 B. 77.

tracted legislative attention, until the fruit of former experience was embodied in the Act of the 16th of June, 1836, which provides, *inter alia*, that the claim or statement filed in the office of the prothonotary, shall set out 'the amount or sum claimed to be due, and the nature or kind of the work done, or the kind and amount of materials furnished, and the time when the materials were furnished, or the work was done, as the case may be.' As this statute, and those of a kindred character, which preceded it, confer a large license upon the class of meritorious citizens whose interests it was intended to advance; our courts have found it necessary, for the protection of others, to hold them to, at least, a substantial compliance with the requisitions of the Acts of Assembly. This observance is, indeed, absolutely essential to the safety of owners, purchasers, and other lien creditors, as furnishing some *data* by which, in case of dispute, they may be enabled to search out the truth. The clue may be an imperfect one; but in this consideration will be found additional reason why it should be afforded to those, who, otherwise, are left to grope in obscurity, without even a glimmer of light by which to direct research. As the law calls for nothing unreasonable at the hand of him who would fasten an encumbrance upon the property of his neighbour, no just ground of complaint is afforded by insisting upon a rigid adherence to its provisions. The information it exacts is, or ought to be, entirely within the power of the creditor to give, and an omission to put it on the record is, therefore, without excuse: Rehrer *v.* Zeigler, 3 Watts & Serg.

258; Thomas *v.* James, 7 Watts & Serg., 381; Witman *v.* Walker, 9 Watts & Serg., 186. Indeed, the great object of the statute in pointing out the characteristics of the statement to be filed, would, in the end, be utterly defeated, were we to indulge the laxity of practice which ignorance and carelessness conspire to introduce and perpetuate."[1]

But notwithstanding this language, the great current of authority is in favour of a most indulgent regard for these claims, in respect of their form.

A late decision of the District Court for the City and County of Philadelphia, contains suggestions which deserve mention here. Hare, J., in delivering the opinion of the court, says: "Although the system of mechanics' liens owes its origin to the liberal ideas of the present day, it is encumbered with restrictions unknown to the most technical periods of the English law, it is without the aid of the statutes of jeofails, and beyond that of the common law power of amendment. Where so much strictness is required in allegation, we should not impose additional difficulties in the way of proof, and should, in the language of Lord Mansfield, avoid entangling the right in a net of form."[2]

There is a class of cases in which questions of construction have arisen with reference to the retrospective effect of certain Acts of Assembly, which should be noticed here. In some of these instances, the views of the court have been based upon the words of the particular enactment. Thus, it was made a question,

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[1] 6 B. 191.

[2] Haviland *v.* Pratt, 9 Leg. Int. 98.

whether the Act of 1803 applied to a building erected before its passage. The court refer to the words in the Act, "all buildings thereafter to be constructed and erected," and appear, in part, to rely upon them in deciding that such a building was not within its provisions.

But in this case the court also say; "and if that Act is to comprehend such cases, it might follow, that a mortgagee or judgment creditor, whose lien commenced between the beginning of the building and the making of the law, would be cut out by an *ex post facto* operation, which never could have been the intent of the legislature."[1]

So, in a later decision, the court held that the Act of June 16th, 1836, was prospective in its operation, and did not affect claims filed prior to its passage. But it does not appear from the opinion whether this conclusion was reached upon general constitutional principles or from the words of the statute.[2]

But in subsequent cases new aspects of the question were presented. Soon after the Act of 1840, to which we have already referred, which confined the lien of the mechanic, and the title under it, to the estate "of the person or persons in possession at the time of commencing" the building, "and at whose instance the same is erected," the courts were called upon to decide whether a sale made after the passage of the Act, un-

[1] Steinmetz *v.* Boudinot, 3 S. & R. 542.

[2] Church *v.* Davis, 9 W. 304. See also, Evans *v.* Springer, 2 M. 30. Matlack *v.* Hoy, ib. note. Hays *v.* Tryon, 2 M. 212. Mustin *v.* Vanhook, 3 Wh. 574.

der a claim filed before it, was governed by its provisions; or whether a fee simple passed to the purchaser, in accordance with the enactments of prior statutes, as construed by the decisions.

It will be found, upon referring to the Act of 1840, that though there are no expressly retrospective words in the enactment, there is ground for a presumption that such an effect was intended.

In the earliest of these cases Sergeant, J., in delivering the opinion of the court, says: "All that has been or can be objected to the provisions of the Act of Assembly in question, passed on the 28th of April, 1840, is, that it has modified the remedy which the creditor possessed, according to the construction of the courts, for the recovery of his debt, under the previous Acts of Assembly giving mechanics and material men a lien for their work or materials. But it is now clearly established, by repeated decisions, that the legislature may pass laws altering, modifying or even taking away remedies for the recovery of debts, without incurring a violation of the clauses in the constitution which forbid the passage of *ex post facto* laws, or laws impairing the obligation of contracts. And where the provisions of such laws, in relation to remedies, apply only to future proceedings, there is not the least ground for appealing to constitutional restrictions on the powers of the legislature. Such is the case in the present instance, so far as concerns sales thereafter to be made; for the Act expressly declares, that no other or greater estate shall be sold by virtue of any execution directed or authorized by the

former act, than that of the person who is in possession and erecting the building. Supposing, therefore, that the Act of 16th of June, 1836, was subject to the same interpretation which was given by this court to the Acts of 1803 and 1806 (which, however, has never been decided;) yet it is no more than a statutory enactment abrogating the existing remedy in all future proceedings. The remedy, itself, certainly, went to a great extent, when it enabled one person to divest another of his land without his participation in the building, and, perhaps, without his knowledge. It was, moreover, altogether a statutory remedy, created by the legislature, not known to the common law, a boon to a favoured class of the community, for the special encouragement of labour in the erection of houses, and subject to the control of the legislature, either to alter, vary or modify it, or repeal it altogether. Montgomery, the purchaser, has no reasonable ground of complaint, because the Act was passed several months prior to his purchase, and, therefore, he is to be considered as well aware of it, and as buying under its authority and subject to its provisions, according to which he took only the leasehold estate of Miller, as his assignee, and is subject to all the covenants contained in the lease."[1]

In this decision, it will be observed, the reasoning of the court is based entirely upon the doctrine, that the Act in question did not impair a contract, but only modified a remedy. Its effect, as a statute declarato-

[1] Evans *v.* Montgomery, 4 W. & S. 220.

ry of the meaning of that of 1836, was not referred to, nor was its retroactive force with reference to a title actually vested under the Act of 1836, prior to its passage, in controversy.

But in a case following it, immediately, the question of its effect upon a sale made before its enactment, came directly up. In that case the claim had been filed and a sale under it made in 1839. Gibson, J., after an earnest, and almost indignant opinion in favour of the law as it stood under the earlier decisions, says:—"But, whatever the design, a legislative mandate to change the settled interpretation of a statute and uproot titles depending on past adjudications, or a legislative direction to perform a judicial function in a particular way, would be a direct violation of the constitution, which assigns to each organ of the government its exclusive function and a limited sphere of action. No one will assert that a court would be bound by a mandate to decide a principle, or a cause in a particular way. Such a mandate would be a usurpation of judicial power, and more intolerable in its exercise than a legislative writ of error, because the losing party would be concluded by it, without being heard. In the case before us, we are firmly convinced, that the legislature did not design to deprive purchasers of their titles acquired under the original act; but whatever the design, we are bound to give the section a benign interpretation.

"Yet we are not compelled by the preceding considerations to give it an operation entirely prospective. No one has purchased on the faith of a judicial expo-

sition of the Act of 1836, for it has received none. Purchasers have acted on their own interpretation of its meaning, and, consequently, on their own responsibility. They cannot complain of violated faith given to the accredited act of a constitutional organ; and, till the judiciary has fixed the meaning of a doubtful law, the legislature has a right to explain it. The Act of 1836 was susceptible of such explanation. It was not the law which had been before the courts; and the construction given to its predecessors, was not applicable to it with conclusive force. For that reason alone the judgment is sustained."[1]

It is very manifest from this language of the court, that if the Act of 1836 had been previously construed as prior Acts had been, and as it must have been, had a case arisen, the decision would have been different. The Act of 1840 was evidently treated by the court as one affecting rights and contracts, and not a mere modification of the remedy. And it was only saved, so far as its retroactive effect was concerned, by the very forced and artificial argument, that as the Act of 1836 had not actually received a judicial construction, no right could, technically, be said to be impaired. This decision disregarded entirely the very simple reasoning that Acts prior to that of 1836 had been expressly held to affect the fee, that the Act of 1836 did not differ from them at all in this respect, that the earlier decisions were, therefore, in fact, constructions of the law of 1836, so far so, at least, that upon the faith

[1] O'Conner *v.* Warner, 4 W. & S. 223. And see O'Brien *v.* Logan, 9 B. 97.

of them, the title in question, and others had been taken.

We cannot but consider the opinion of the court in the latter case, therefore, as somewhat in conflict with the former.

In a still later case the subject came up under a different Act, and new elements appear to have been introduced. We have before remarked, that prior to 1845, it had been decided that no person who had done work, or furnished materials, under a special contract, could file a claim, and that an enactment of that year had declared that the Act of 1836 should be construed so as to induce such contract. A claim was filed, in 1843, alleging a special contract, and upon a *scire facias*, the question arose, in 1847, whether the Act of 1845 had a retroactive effect to support it. Ch. J. Gibson says: "So far as regards the parties to the contract to build, the enactment of the statute in question was clearly constitutional. No alteration of their rights was proposed, further than to give a specific remedy against the property, in addition to the remedy which the contractor had against it, indirectly, by action; and retrospective laws have always been sustained, where they touched not the right, but the remedy. So far there is no dispute. But the scene may be changed by the introduction of a purchaser for value, actually paid, at a time when the property was free from the supposed lien; and it is proper to say, that his having had notice of a defective lien would be immaterial. . . . A mechanic's lien depends on no principle of moral right, but

on positive enactment, of which it is the creature; and beyond the terms of which it cannot be extended. If, then, the legislature cannot directly create a lien for the debt of another, where none existed before, it cannot do it, indirectly, by putting a particular construction on a statute which had received a different construction before the period of the purchase." [1]

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[1] Bolton *v.* Johns, 5 B. 149.

CHAPTER III.

OF THE LOCAL EXTENT OF THE LAW.

The provisions of the Act of 1803 were confined to "the city of Philadelphia, the district of Southwark, and the township of the Northern Liberties." That Act was repealed, however, by one of 1806, except so far as it applied to liens cognizable by its provisions previously to the later Act, and to actions then pending under its enactment.

The Act of 1806 embraced "the city and county of Philadelphia."

By an Act of March 28th, 1808, the Act of 1806 was declared to be in force "in the borough of Erie, in the county of Erie, the borough of Lancaster in the county of Lancaster, and the borough of Pittsburgh, in the county of Allegheny."

By an Act of January 21st, 1813, the Act of 1806, with its supplement of 1808, were declared to be in force "in the borough of Beaver, in the county of Beaver."

By an Act of March 1, 1815, the same Act and supplement were declared to be in force "in the borough of Marietta, in the county of Lancaster, and the borough of Harrisburgh, in the county of Dauphin."

By an Act of March 22nd, 1817, the same Act and

supplement were declared to be in force "in the Borough of Reading, in the county of Berks, in the Borough of Westchester, in the county of Chester, and in the towns of Allegheny, Birmingham, Sidneyville, Belinstown, Bayardstown, Lawrenceville, and Wilkinsburgh, in the county of Allegheny, and all other towns and villages that now are or may be laid out within ten miles of the line of the city of Pittsburgh, and in every part of the counties of Lancaster, Montgomery, York, Dauphin, Franklin and Lebanon."

In the case of Tilford *v.* Wallace, a lien was filed against a brick house situated "on an eminence between the Pittsburgh and Greensburgh Turnpike, and the village of Lawrenceville." It was proved at the trial, that the building was not in the village of Lawrenceville, nor in any village possessing a name, but that it was in the midst of a collection of buildings adjoining Lawrenceville. It was held by the court that the lien was invalid; that the house was not within the town of Lawrenceville; that, though it was within two miles from Pittsburgh, the collection of buildings among which it stood, having no name, could not be considered as a "town," or "village," and that it was therefore not within the terms of the Act of 1817.[1]

By an Act of March 24, 1818, the same Act and supplement were declared to be in force in the counties of Cumberland, Northumberland, Columbia and Beaver.

[1] 3 Watts, 143.

By an Act of March 7th, 1821, they were declared to be in force in the counties of Delaware, Bucks, Luzerne, and Mifflin.

By an Act of April 11th, 1825, they were declared to be in force in the counties of Schuylkill, Berks, Erie, Somerset, and Venango.

By an Act of April 10th, 1826, they were declared to be in force in the counties of Crawford, Lycoming, Centre, Clearfield, and Indiana.

By an Act of April 16th, 1827, they were declared to be in force in the county of Union.

By an Act of February 4th, 1830, they were declared to be in force in the borough of Easton, in the county of Northampton.

By an Act of March 30th, 1831, they were declared to be in force in the counties of Bedford, Cambria, Tioga, and Armstrong.

By an Act of May 7th, 1832, the Act of 1806 and supplements of 1808 and 1831 were declared to be in force in the counties of Chester, Butler and Perry.

By an Act of April 11th, 1835, the Act of 1806, and its supplement of 1808, were declared to be in force in the counties of Warren and Juniata.

By an Act of April 13th, 1835, the Act of 1806, and its supplements of 1808 and 1831, were declared to be in force in the counties of Washington, Huntingdon, Mercer, Beaver and Allegheny.

By an Act of April 1st, 1836, the Act of 1806, and its supplements of 1808 and 1831, were extended to Susquehanna county.

It will be observed, that, in some of these several

Acts extending the lien, no mention is made of any supplements except that of 1808, and that, in others, those of 1808 and 1831 are both embraced.

The Act reported by the Commissioners to revise the Civil Code, on the 4th of January, 1836, applied to the whole Commonwealth. It ran;—"Every building erected within this Commonwealth shall be subject to a lien, &c." And they say, in speaking of this section:—"The first section makes the provision general. It has already been extended over the principal part of the state, rural as well as urban, and we see no reason why it should not be general. If it should not be acceptable, however, in any county, or place, a section may be added excepting such place."

When the Act came before the legislature, however, it was altered in this respect. The Act of June 16th, 1836, which was, in the main, that reported by the Commissioners, and which was intended to bring into one body all the provisions upon this subject, repeals so much of any law as was altered by its enactments, and declares its own provisions applicable to the several counties to which the Act of 1806 "and the several supplements thereto" then extended.

It was, no doubt, the intention of the legislators that the benefit of this Act of 1836 should extend to all of the several counties, boroughs, towns and villages in which the Act of 1806 had been declared to be in force, without reference to the fact whether all of its supplements had been extended to each of them. But the words of the former Act might, upon a strict construction, lead to a question. Particularly, when

we find, as will appear presently, that even since the Act of June 16th, 1836, and its repealing clause, the Act of 1806 and its supplement of 1808, alone, have been declared to be in force in a certain locality; as if there were those who still preferred the provisions of the earlier statute, and that one supplement, to those of the later one. It would be dangerous, however, to hazard the opinion that no county which, prior to the passage of the Act of 1836, had not received the Act of 1806 and all its supplements, was not included in the new legislation, for the whole weight of usage, at least, seems to be the other way.

The Act of June 16th, 1836, extends its own provisions to the county of Lehigh.

By an Act of April 16th, 1838, the Act of 1806, and its supplement of 1808, were declared to be in force in the county of Bradford. It will be seen however, presently, that in a subsequent year, this Act was repealed, and the Act of 1836 was extended to the same county.

By an Act of April 16th, 1840, the Act of 1836 is declared to be in force in Wayne and Fayette counties.

By Acts of March 19th, and April 6th, 1841, the Act of 1836 is extended to the counties of Clinton, Clarion and M'Kean.

By an Act of February 19th, 1842, the above Act of 1838 is repealed, and the Act of 1836, and its supplement of 1840, are extended to Bradford and Monroe counties. By Acts of March 25th and August 2nd, of the same year, the Act of 1836 is extended to Greene and Dauphin counties.

By an Act of April 5th, 1843, the Act of 1836 is extended to the counties of Potter and Jefferson.

By an Act of March 19th, 1844, the Act of 1836 is declared to be in force in Northampton county.

By an Act of March 11th, 1846, the Act of 1836, with its supplements, and a supplemental provision of an Act of 1845, are extended to Pike county.

By an Act of April 13th, 1846, the Act of 1836, "together with the several supplements thereto," are extended to Adams county.

By an Act of April 9th, 1849, the Act of 1836 is extended to the counties of Westmoreland and Elk.

By an Act of April 26th, 1850, the Act of 1836 is extended to Carbon county.

The following counties, therefore, seem now to be included within the general provisions of the law of 1836, and to many of them its supplements extend.

Adams,	Clarion,	Huntingdon,
Allegheny,	Clearfield,	Indiana,
Armstrong,	Clinton,	Jefferson,
Beaver,	Columbia,	Juniata,
Bedford,	Crawford,	Lancaster,
Berks,	Cumberland,	Lebanon,
Bradford,	Dauphin,	Lehigh,
Bucks,	Delaware,	Luzerne,
Butler,	Elk,	Lycoming,
Cambria,	Erie,	M'Kean,
Carbon,	Fayette,	Mercer,
Centre,	Franklin,	Mifflin,
Chester,	Greene,	Monroe,

Montgomery,	Potter,	Venango,
Northampton,	Schuylkill,	Warren,
Northumberland,	Somerset,	Washington,
Perry,	Susquehanna,	Wayne,
Philadelphia,	Tioga,	Westmoreland,
Pike,	Union,	York.

It is hardly worth while to enumerate the boroughs, towns and villages mentioned in some of the Acts which we have referred to. The entire counties in which they are found, have, by later provisions, been included within the application of the law.

These several counties are not, however, upon exactly the same footing, with respect to all the provisions of the Acts of Assembly in regard to the lien of mechanics and material men.

By the 29th section of the Act of 1836, the lien is extended to plumbers, and persons furnishing curbstone within the city and county of Philadelphia only.

By an Act of April 24th, 1843, this section was expressly declared to be in force in Northampton county. But this enactment seems to have been premature. The rest of that Act was then not in force, in any part of that county, except the Borough of Easton. In the next year, 1844, the mistake appears to have been discovered, and the entire Act of 1836 was extended to the whole of Northampton county.

By an Act of March 24th, 1849, the Act of 1836 is "extended to plumbers within the county of Chester." And by an Act which became a law on the

23rd of January, 1849, the 29th section of the Act of 1836 was, also, extended to that county.

By an Act of May 6th, 1844, the Act of 1836 is extended to plumbers and persons furnishing curb-stones, &c., &c., within the bounds of the city of Lancaster.

By an Act of April 9th, 1849, the Act of 1836 is extended to "every fixture in and about iron works and mines, and to every bridge and building where work is done, or materials furnished in the construction of such fixture, in and about mines or iron works, bridge or building for any corporate, body," &c. But this provision only applies to the counties of Columbia and Elk.

By an Act of April 21st, 1854, extending only to Schuylkill county, the Act of 1836 is extended to the "improvements, machinery and fixtures erected by tenants of coal lease estates, on lands of others, and to all mechanics and material men, doing work and furnishing materials therefor."

Certain special licenses in procedure are, also, by different Acts granted within one or two counties only. Thus by an Act of March 24th, 1849, mechanics or material men, in the counties of Philadelphia and Chester, are allowed to include both work and materials in the same claim. And the Act just mentioned, which extends the application of the law in Schuylkill county, gives a peculiar process for the recovery of the sums secured by the liens for which it provides.

The general character of the distinctions made between different counties will appear from these remarks. Under the proper heads we shall treat them more in detail.

PART II.

OF THE CASES TO WHICH THE LAW APPLIES.

CHAPTER I.

WHO MAY HAVE THE LIEN.

It is scarcely worth our while to discuss the question, who may have this remedy in respect of their personal *status*. No particular mention is made, in the several Acts, of minors, *femes covert*, idiots, lunatics, persons acting in a fiduciary capacity, or aliens. It is presumed that the same rules which govern their respective rights and remedies in other cases, will be applicable, generally, to this subject.

It might appear, at first view, that, under this head, it would be proper to consider who may have the lien with respect to the nature of his trade or occupation. It will be found on reflection, however, that this topic falls more properly under the next head. Whether the paper-hanger, plumber or other particular artisan is within the law, is a question depending, as will be found, less on himself and his own

relation to the structure, than on the relation and importance of his work. It has respect to the debt, therefore, for which a claim may be filed, and its nature and origin, rather than to the person of the claimant.

But there are certain other questions depending on the character of the person who makes the claim with respect to his relations with others connected with the structure, which it is proper for us to mention here. These questions have arisen in reference to the claims on the part of the owner of the building himself, the contractor, as he is called, or middle man between the owner and those more directly concerned in the construction, the sub-contractors, or those whose several contracts relate only to specified portions of the work or materials, the master mechanics and material men employed by the contractor or sub-contractors, and the mere journeymen and day-labourers.

It has been held that an owner cannot enforce a claim against his own building, so as to prejudice third persons. In one of the cases in which the point arose, a voluntary association of the Order of Odd-Fellows erected a building for a Lodge, upon premises conveyed to trustees for their use. Several members of the association filed claims and pressed them before an auditor appointed to distribute the proceeds of a sale of the premises by the Sheriff. Their liens were disputed by other creditors. The Court in its opinion, says: "But that a person can enforce a lien on his own building, at the expense of third persons who hold similar liens on it for debts contracted by the former to the latter, is not reconcileable with law

or equity. At law, the lien of the owner would merge in the property, since no man can be both debtor and creditor; and equity would not uphold it, in order to place in the hands of the owner himself, a portion of that fund which ought to go to his creditor, whose debt was contracted on the faith of the fund."[1]

In another case, the owner did work upon his own building, but filed no claim. Other claimants, however, sought to avail themselves of his work to give their own a relation back which would cut out a judgment: Huston, J., says:—"As to what was done by the owner, whether it was propping the walls, or propping the scaffold and covering the walls, I leave it out of the case; he got no lien by that, nor could he acquire any lien by any work he could do: his work is not within the law." "If his work could create no lien in his own favour, it is not easy to see how it can, by relation, carry back the lien of other workmen, so as to over-reach and cut out the judgment creditors of the owner."[2]

In the first of these two cases, the Court say: "It is possible that persons jointly owning lots of ground, and erecting buildings upon them, to which they furnish work and materials, may file liens under the Acts of Assembly, and maintain them, among themselves, on the ground that they are in *equali jure*, and to be considered as mutually waiving objections." And they only held, that those claimants who were members of the association should be *postponed* to

[1] Babb *v.* Reed, 5 R. 159.

[2] Stevenson *v.* Stonehill, 5 Wh. 306.

those who were not; rather intimating, by the language of the decision, that the former might, when the latter were paid, come in upon the balance.

The court, in these decisions, probably, intended to cast no doubt upon the right of an owner to purchase a mechanic's lien, and keep it alive against his own property, for his security, in cases similar to those in which he might purchase a judgment or a mortgage, and continue its existence for a like purpose.

The next person whose right to file a claim has been brought in question, is the person ordinarily called the contractor. He is the middle man between the owner and those more directly engaged in the erection, and, generally, has a gross contract for the entire building. He employs the workmen and buys the materials, and is, personally, their debtor for all that they do or furnish. Such intermediate agents are very common.

In the Act of 1803 no provision was made for any case in which the owner was not the debtor. A claim could be filed only for a debt "contracted by the owner or owners." The contractor, in the present sense of the term, was, not only, not mentioned, but his interposition between the mechanic and the owner would have prevented the application of the Act, and deprived the claimant of his lien.

In the case of Steinmetz *v.* Boudinot, the mechanic had made no contract with the legal owner of the premises against which he filed his claim, but with one to whom the owner had covenanted to convey, on ground rent, and who was erecting the building. The

Court say, upon this point: "But, whether the defendant was owner, or not, was immaterial, unless he *contracted the debt.* When this Act of Assembly was made, it was very common for the proprietors of ground to contract with a mechanic of character, for the building of a house. The proprietor paid a certain sum of money for the building, when completed; and the mechanic purchased materials, and built the house, *on his own credit.* Now it is very clear, that, in such case, the act created no lien."[1]

So, also, in Jones *v.* Shawan, Gibson, C. J., says: "By reason of the novelty of the subject, it happened, that the first Act fell short of the object, in omitting to secure those who, bargaining with a middle-man, had not an opportunity to secure themselves."[2]

How far a contractor might have been considered, or might have become, under the circumstances, an agent for the owner, in employing mechanics and purchasing materials, and thus have bound the owner as the debtor, and made a case for the application of the Act, does not appear to have been considered.

In the Act of 1806, the words, "by the owner, or owners thereof," were omitted, and "the lien was extended to all cases of work done, or materials furnished, for a building, whether on the credit of the owner or not."[3]

The Act of 1806, however, did not expressly speak of a contractor. That of 1808 pointed more distinctly

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[1] 3 S. & R. 542. See Carson *v.* Boudinot, 2 Wash. C. C. R. 33.
[2] 4 W. & S. 264. [3] Steinmetz *v.* Boudinot, 3 S. & R. 543.

to him, in its provision for a personal action against the "*debtor*, his executors, or administrators," as distinguished from a *scire facias* against the *debtor* and owner of the building," but still he was not indicated by that name.

In the Act of 1836, the "contractor, architect or builder, is, for the first time, expressly, introduced into the system, and recognised as an important party. His name is required to be inserted in the claim, and he, of course, becomes a defendant, with the owner.

But though his title is here found, for the first time, in any enactment upon this subject, it will appear, from the cases which we shall hereafter cite, in treating of the parties to the proceedings by which the lien is enforced, that his position had long been recognised in the courts.

It was not, however, until after the Act of 1836, that the question directly arose, whether he was within the benefit intended by the law, and could, himself, file a claim against the owner.

In a decision made in 1842, Gibson, Ch. J., in delivering the opinion of the court, says: "In a case like this, where the claimants were themselves the contractors, it is not easy to comprehend the prayer for direction, that a claim can be filed only against the claimant and the contractor together.

"If it be meant to show that the plaintiff had no right to file a claim at all, it was properly put; for it is he who has found the labour or materials, and not he who has ordered it, that is entitled to the lien. Were the contractor as well as the mechanic, or material men,

allowed to file, there might be double liens and possibly double recoveries, which the law does not tolerate. By reason of the novelty of the subject, it happened that the first Act fell short of the object in omitting to secure those, who bargaining with a middle man, had not an opportunity to secure themselves," "in consequence of which it was displaced by the Act of 1806, which provided for those who directly furnished materials and labour, and not for the middle man, who took his own security, and furnished nothing but his superintendence and skill as an undertaker. Indeed, so different is his position as a contractor, from that of a claimant, that his name is required to be inserted in the claim as a respondent. The plaintiffs, therefore, had no right to file for any thing furnished pursuant to their contract as undertakers; though they might have done so for any additional work or material directly furnished by themselves."[1]

In the case of Hoatz *v.* Patterson, the same conclusion was reached. Rogers, J., in delivering the opinion of the court, says:—"The point is not new, for it has been, already, virtually decided in Jones *v.* Shawan, (4 W. & S. 257.) One who furnishes nothing but his superintendence and skill as an undertaker, has no right, as is there held, to file a lien for any thing in pursuance of his contract, as such. Although the observations of the Chief Justice seem to be restricted to a superintendent merely, yet the case really was, in every essential feature, identical with

[1] Jones *v.* Shawan, 4 W. & S. 264.

this. The contractor agreed to furnish all the materials and erect the buildings for a fixed price, and it is to such a state of things that the remarks were intended to apply. The remark that he who found the labour or materials, and not he who ordered it, is entitled to the lien, applies in all its force here. It is not intended to deny, that where there is a special contract, a person who furnishes materials or finds labour, may have a lien against the buildings notwithstanding; but, can the same individual stand in the double character of contractor and material man? We see no good reason that he should. If he is entitled to file a lien, it must be when the contract is made; for it is very plain, that nothing that he can do afterwards, can alter his position, nor can he, under the pretext that he furnished the materials, as well as superintended the work, burden the property with a double lien. What is it to the owner, in what way he procures the materials or finds the labour, whether it be by purchase, or out of his own stores; whether by his own labour, or the labour of others whom he hires for that purpose? The owner has a right to take it for granted, when there is no stipulation to the contrary, that the contractor is satisfied with the security for the faithful performance of the contract; for when the bargain is made, or before he commences the work, is the proper time to exact real or personal security, if he requires it, or to depend, as he may in many cases, with confidence, on the known ability and integrity of the owner. As this case does not, as we apprehend, come within the mischief, we are unwilling

to extend its operation by construction; for, without being additionally burdened, already, are owners, desirous of improving their estates, exposed to great risks, which can only be avoided, if at all, by extreme care and great caution.

"The argument of the plaintiff's counsel, also adds strength to this view of the law, as he has clearly shown the difficulty of setting down the exact time when each item is furnished for the work or labour performed; a condition expressly enjoined by the Act, and held essential in several cases. In the case in hand, there is no colour for the suggestion, (even if that would alter the law,) that the contractor was engaged in the business of supplying materials, or that the work was performed by his own hands. The materials were obtained by purchase, as they were needed, or in the way provided in the agreement. He hired master-workmen, as the master-mason, for instance, to perform the labour, he being responsible for the whole, and they acting under his superintendence and direction. This is mentioned as an ingredient in the case, although, as before observed, it would make no difference, in principle, even if he had, in whole or in part, furnished the materials from his own stores. There would, in either case, be the same inconvenience arising from double liens and double recoveries, and the same incongruity, in the same person being both plaintiff and defendant. It would present a curious spectacle of legal incongruity, if the master-mason, for example, should file his lien against the owner and the *contractor*, and the *contractor* should also

file his lien against the owner, for the same claim. But this is the effect of the position contended for. It is impossible, however, to believe that the legislature ever contemplated such a legal absurdity."[1]

In Bolton *v.* Johns, also, Gibson, C. J., says:—"I mean not to go into a formal defence of those decisions; but if ever human statute disclosed an intention not to be mistaken, that statute disclosed an intention, that the contractor whom it ordered to stand as a respondent, should not, in any case, assume the attitude of a demandant. And there was cogent reason why he should not; for, unlike those who dealt with him as a middle-man, he had an opportunity to secure himself by his contract with his employer, and if he omitted to embrace it, the fault was his own. It was the frequency of loss sustained by mechanics and dealers, in consequence of the employment of this kind of agent, which first induced the legislature to give them a lien on the building; for if the owner of the ground had continued to be his own master-builder, as he was in the primitive days of the province, those who dealt with him would have had no juster claim to such a lien, than the ploughman of another's field would have to a lien on the crop. It was not the merit of the contractor, but the loss he occasioned, that gave rise to the system; and the object of it was, not to secure him, but to secure those who had else been put in jeopardy by him. But if, to their legitimate liens, he had been allowed to add a particular lien of his own,

[1] 5 W. & S. 538.

there would have been a scuffle between him and the furnisher of the labour or material, for the pay, in which the court would have been employed to determine, not whether the article had been furnished on the credit of the building, but whether the contractor had made it his own by having paid for it; and that would have involved a variety of matter of account, set off, and dealings between him and his competitor." [1]

The reasons for excluding the contractor from the benefit of the law, as far as we can gather them from these decisions, are numerous.

He does not supply materials or perform work, but merely orders them. He furnishes nothing, himself, but skill and superintendence, for which no lien is given. The Act contemplates him only as a defendant in the proceeding, and not as a plaintiff. If he is allowed to file a claim, double liens will be filed for the same work and materials, and there may be double recoveries. He shows by his bargain with the owner, from whom he may demand security, if he pleases, that he really gives no credit to the building. If he is entitled to a lien, it must be, when he has made the contract; for the liability of the owner is complete, then. These are the suggestions of the judges whose opinions we have quoted.

But it will be observed, that it is not, in any one of these cases, put, distinctly, on the ground, that no one can file a claim, whose work is done, or materials fur-

[1] 5 B. 150.

nished under a special contract. On the contrary, Rogers, J., says: "It is not intended to deny that, where there is a special contract, a person who furnishes materials, or finds labour, may have a lien against the buildings, notwithstanding."

How that doctrine came, at length, to be asserted, we shall show in another chapter, when we come to speak of the nature of the debt for which a claim may be filed. We are, now, only presenting those views of the subject which depend upon the character and relations of the parties.

There was one further step, which these decisions rendered inevitable, and that was soon taken.

It is said in Bolton *v.* Johns, referring to the previous decisions just noticed: "No more had been determined, than, that the master-builder, or contractor for the building, could not file for his services and skill, in exclusion of the mechanic or material man, for whom alone the statute had provided."

This was a mistake. In Witman *v.* Walker, the claimant had made a written contract to do all the marble work for a house, and the same objection was urged against his claim, as had prevailed against those of the contractors for the whole house. The court cite the cases upon which we have commented, in this connexion, and say: "It is not easy to perceive any difference, in principle, in the circumstance, that the contract is not for the whole building, but for a particular job or piece of work, as here, to put up the marble work of two houses, and furnish marble mantels. The relation of the parties is the same, and similar incon-

veniences and incongruities would ensue to those pointed out in the opinion delivered by Mr. Justice Rogers, in Jones *v.* Shawan, if the same individual might stand in the double capacity of contractor and material man."[1]

These decisions were, however, all rendered inapplicable by the Act of April 16th, 1845, which declared that the Act of 1836 should, "according to the true intent and meaning thereof, extend to and embrace claims for labour done, and material furnished and used, in erecting any house, or other building, which may have been or shall be erected under or in pursuance of any contract or agreement for the erection of the same," and should "be so construed;" and that "no claim which has been or may be filed against any house or other building, or the lien thereof, or any proceeding thereon, shall be in any manner affected by reason of any contract having been entered into for the erection of such buildings, but the same shall be held as good and valid, as if the building had not been erected by contract." A proviso, however, was appended to the enactment, saving from its effect any case theretofore decided by the Supreme court, or in which the proceeds of the sale of any real estate had been distributed by the decree of any court, from which no appeal had been taken.

But a case in the District Court for the city and county of Philadelphia, in which the decision was made long after the Act of 1845, seems to show that, though,

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[1] 9 W. & S. 187.

under its provisions, the contractor or sub-contractor may file a claim, he cannot use it against those whom he employs. In that case, the contractor appeared before the Auditor, and claimed his *pro rata* share of the fund. The court say:—"This contest is not between the owner and contractor, but between the contractor and the mechanics and material men, with whom *he dealt, and to whom he is personally responsible.*

"The letter of the statute puts all the lien creditors under it on the same footing, directing them to be paid, *pro rata*, when the fund derived from the Sheriff's sale, and applicable to their claims, is not sufficient to pay the whole. But this is, manifestly, unjust, when extended to the contractor, whose personal liability would, by this means, be substituted for the substantial security of the real estate of the owner; or, which is the same thing in effect, the value of that real estate in money deposited in court. This works the very mischief which induced the enactment of the original Act in 1803, and has kept the system alive ever since.

"We know of no other instance in which this question has arisen. Babb *v.* Reed, 5 Rawle, 151, is somewhat analogous. There, a number of persons associated themselves, under the name of the "West Chester Lodge, No. 42, of the Independent Order of Odd Fellows." They purchased a lot of ground, which was conveyed to Trustees, for the benefit of the association. The association undertook to erect a Hall for its meetings, several of the members contributed labour and materials in its construction, and third persons furnished assistance, in like manner. The means

of the association fell short of the cost of the building. The ground, itself, had been bought on credit, and a mortgage caused the property to be sold by the sheriff. The proceeds were brought into court for distribution. The claimants of the fund consisted of two classes: 1, of members of the fraternity; 2, of creditors, who were not members. All the claims were for work done, or materials furnished for the construction of the building. The Supreme Court held, that the whole of the said claims were embraced by the Mechanics' Lien Act, and that if the fund was adequate to pay the whole, it ought to be so applied; but that the claims of those who were not members, were entitled to a preference over the claims of such as were members; and, it appearing, that the payment to those who were not members would absorb the entire fund, the decree was, that they only could be paid.

"The distribution of the fund in the case before us, we think, should be made upon the same equitable principle. Between the contractor and the owner of the buildings, unless otherwise specially provided, in their agreement, the contractor has a right to file his claim for whatever may be due him. But, in the distribution of the proceeds of a sale of the buildings, the contractor can receive nothing, until the lien creditors, to whom he is personally responsible, have been paid in full.

"The exception of Jacob Showaker, the contractor, is, therefore, dismissed, and the report confirmed."[1]

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[1] Large *v.* Millette, 12 Leg. Int. 6.

It is proper, in this connexion, to refer to a decision of Lowrie, J., in the District Court of Allegheny county, in reference to the relative positions of the contractor and those whom he employs, whether sub-contractors or otherwise.

In that case, the owners pleaded,—"That the debt claimed ought not to be levied of said house, because the plaintiffs were sub-contractors, under one J. M., (impleaded with the owners,) who had undertaken to erect said house for the owners, and to furnish the materials, and to receive payment therefor, partly, in merchandise, and, partly, in money, in one, two and three years after the completion of the building." To this plea the plaintiff demurred. The court, in delivering its opinion, says:—

Secondly, Are sub-contractors, in the erection of a house, affected, as to the time and mode of payment, by the contract made between the owners and the builder?

"The law creates a lien 'for all debts contracted for work done, and materials furnished' for the erection of the house; and this phraseology proves, that this lien, like all analogous liens, is founded on contract expressed or implied. And here, contrary to the rule as to other liens, the law, in another clause, gives a lien, even in favour of a sub-contractor. On what principle is it founded?

"It must be on contract with the owner, either directly or indirectly; for it is only thus, that one man can ever acquire a claim upon the property of another. And, in this way, the connexion is plain. The owner

contracts with a builder, to erect a house, on certain terms, and the builder makes a sub-contract with a material man, to supply the materials. The chain of relationship consists of but two links, the second of which hangs by the first, and will bear no greater weight. The sub-contractor comes in by reason of his direct contract relation to the builder, and the right of lien of the former, for his claim, is *pro tanto*, substitutionary to that of the latter. As against the owner, the terms of the principal contract, and, as against the builder, the terms of the sub-contract, limit and qualify the lien of the sub-contractor, so as to prevent his claim from abating the terms of either contract. And it is because the lien of the sub-contractor is by way of subrogation to the right of the builder, that the latter is made a party to the proceeding.

"The justice of this limitation of the right of the sub-contractor is very plain; for, if it were otherwise, no man could ever build a house, with any certainty as to the cost of it, unless he employed all the workmen, and purchased all the materials himself. He might find it built of an entirely different character from that contracted for, and yet, have to pay the sub-contractor, though the builder could have no claim upon him. He might contract for a house at $1000, and find liens established against it for $2000.

"If such were the case, no prudent man would make a contract to have a house erected, except with a builder who had ample means to secure him against liens, and such men, only, could obtain the most desirable contracts. The allowance of any lien at all to

a sub-contractor, is a special privilege, granted, only, in case of buildings; and it is not unreasonable to require him to look to the principal contract, to ascertain, whether it is such as to justify him in becoming a contractor under it.

"The argument, that the law and the principal contract make the builder the agent of the owner, proves nothing. Suppose the fact to be so; still his agency is only special, limited by the terms of the contract. He is to employ men to build the house, in the manner and on the terms there indicated. For anything beyond that, he exceeds his authority, and does not bind his principal. If, under a contract to build a brick dwelling house, he erects a wooden stable, I do not see how he or his sub-contractor can claim any lien. Yet the latter could do so, if the sub-contract were not dependent on the principal one.

"To construe the law as is contended for by the plaintiffs, would be to place the owner in the relation of a protector to all those who contribute to the erection of the house. But the law treats every man as capable of taking care of himself. It constitutes no relation of protection or dependence among men who have arrived at legal discretion. It looks only to their contract relations, and adapts its remedies to the enforcement of these; and if necessary for this end, it takes hold of the debtor's effects in the hands of other persons. In cases like the present it does more; for it gives a contingent lien on those effects, in advance of their being earned."[1]

[1] Campbell *v.* Scaife, 8 Leg. Int. 74.

If this decision be the law, it establishes a most important doctrine. Every person employed by a contractor is presumed to have seen his contract, and as against the owner, and his house, his claim cannot rise beyond it, or depart from its terms.

We believe, however, that this decision is not regarded in practice or usage. And, indeed, the cases which we shall hereafter cite, in treating of the evidence which the claimant must adduce, seem to contravene its principles. They appear to allow the sub-contractor or master mechanic or material man to prove and recover, upon the contract made with him, or, if there be no such contract, upon the *quantum meruit*.[1]

We now come to the position of the master mechanic or material man, who is supposed to have made no contract for any particular portion of the building, which would bring him within the description of the contractor or sub-contractor, of whom we have just treated, but who, yet, may, notwithstanding, be employed under a contract. He may be paid by the day, or by measurement, or according to the quantity delivered.

There has never been any question about the right of this class to the lien. The only difficulty has been to distinguish them from the next class of journeymen and common hands or day labourers.

If the position of the contractor, under the Act of 1845, leads to the danger of multiplying and doubling

[1] See Post, Chapter on Evidence.

liens, how much more would arise, if every individual whose labour or materials were expended, could file a claim. The day labourer, who digs the foundation, or carries a hod; the carter who hauls the brick, stone, lime or lumber; every one, however subordinate, would add his mite to the mass of incumbrance, overwhelming the premises. The costs, alone, would be a burden not to be borne.

It was, therefore, settled, at an early period, that there was a class of subordinates, employed by the master mechanic and material man, who could not file a claim. But it has been no easy task to define the limit of that class;—to say, in each case, who is the subordinate.

It was held in Cobb *v.* Traquair, in the District Court for the city and county of Philadelphia, so early as 1819, that "only the principal of each branch or trade," had a lien.[1]

But the fullest discussion of the subject is found in the case of Jobsen *v.* Boden, in which Jobsen, the contractor for a mill, hired Boden, by the day, to work as a carpenter and millwright, for a stipulated price. We give the decision of Bell, J., at length. He says:—"As early as the year 1819, it was decided by the District Court of Philadelphia, that a journeyman mechanic, employed in working on a building, under the original contractor or master mason, could not file a lien against the erection, under the Act of 1806, notwithstanding the general or comprehensive words of

[1] 1 Frank. Inst. Journ. 97. See also, the opinion of Randall, J., Barnes *v.* Wright, 2 Wh. 196.

the statute, which, taken literally, would seem to include every grade and class of workmen, from the chief builder, down to the least important day labourer; Cobb *v.* Traquair, 1 Frank, Jour. 97. The doctrine was repeated by Judge Randall, then of the Common Pleas of Philadelphia county, in Barnes *v.* Wright, 2 Wh. 196; and, indeed, it seems to have been every where recognised by the profession, as a well established principle, firmly founded in reasons of public policy and convenience. The Act of 16th June, 1836, which embodies and supplies former enactments on the subject of mechanics' liens, is not broader in its terms descriptive of the persons entitled to create a lien, than is the Act of 1806. It cannot, therefore, be pretended, that the latter Act enlarges the circle of those upon whom the first statute conferred the privilege of lien, by admitting to a participation a class of workmen not before contemplated. Had such been the intention, the legislature, doubtless acquainted with the prior adjudications and the prevailing opinion on the subject, would have taken care to manifest it by unequivocal language. But in this respect the only difference between the two enactments is that the older of them, after naming certain trades and occupations which should be entitled to the benefit of its provisions, extends them, to any other person or persons employed in furnishing materials for or in erecting or constructing such house or other building;' while the younger, rejecting the special enumeration as redundant authorizes, generally, a lien for the payment of all debts contracted for work done or mate-

rials furnished for or about the erection or construction of any building. That, in this feature of them, the statutes are equally extensive, is, indeed, shown by Savoy and Salter *v.* Jones, 2 Rawle, 343; in which it was held, that the Act of 1806 is not confined to the classes of persons specially enumerated in it, but embraces all persons employed, either as builders, or material men. As, then, the law stood, under these enactments, it is very certain, one who may be merely engaged as a journeyman, was not within their spirit, though, perhaps, comprehended by the letter. It is, however, supposed by the plaintiff below, that a change was effected by the 5th section of the Act of 16th April, 1845, (Dunl. Dig. 951,) which declares, that the Act of 1836 shall be construed to extend to, and embrace claims for labour done, and materials furnished and used in erecting any house or other building, which may have been or shall be erected, under or in pursuance of *any contract or agreement* for the erection of the same; and that no claim which has been or may be filed against any house or other building, or the lien thereof, shall be affected by any contract having been entered into, for the erection of such building; but the same shall be held as good and valid, as if the building had not been erected by contract. But it is notorious, that the object of this declaratory Act, was, not to extend the remedy of lien to the wages of subordinate workmen, but to correct a supposed error of judicial decision, committed in the cases of Hoatz *v.* Patterson, 5 W. & S., 537; and Haley *v.* Prosser, 8 W. & S. 133. In these cases, it has

been determined, that one who undertook, by special contract, to erect a building, for a gross sum, was not within the purview of the mechanic lien laws; because, by his agreement, the intention of the contracting party to rely upon the personal security of the owner, in the absence of a contrary stipulation, is manifested. It is perfectly apparent, from the tenor of the Act of 1845, that, notwithstanding the general words relied on by the plaintiff below, touching all claims for labour done and materials furnished, nothing further was intended, than to extend the provisions of the Act of 1836 to actual contractors, whom prior decisions had shut out from its benefits. Indeed, the general clause to which I have referred, is not more comprehensive, and, therefore, not more efficacious, to include all classes of artisans, than the language employed in the Act of 1836, which, as I have said, was never thought to reach persons in the plaintiff's position.

"This restricted construction seems to be absolutely necessary to the safety of the proprietors of newly erected buildings. Since the Act of 1845, their property is exposed to a double lien, for the same work done and materials furnished; one, in favour of the contractor or undertaker of the erection, and, another, to secure the master workmen employed by him. Were the plaintiff's construction of the statute admitted, to these would be superadded the lien of every individual workman engaged by the principal, even for a day, or to the extent of preparing a bed of mortar. This would soon be felt as intolerable. Before the Act of 1845, it was observed in Hoatz *v.* Patter-

son, 5 W. & S. 537, that owners, desirous of improving their estates, are exposed to great risks, which can only be avoided, if at all, by extreme care and caution. To increase these risks, so materially as we are now asked to do, would be seriously to interfere with the growth and improvement of our cities and towns, by interposing obstacles to the march of meritorious enterprise, and thus, eventually, to injure the workman himself. For the introduction of such a rule, a distinct manifestation of legislative will is necessary. It is, in our apprehension, far better, for all parties, to leave the journeyman operative to the security he most commonly relies on, the personal responsibility of his employer."[1]

But what is the criterion of the position which excludes the mechanic from the benefit of the law. In one case, a master brick-layer, who employed hands to do his work, filed a claim, which was opposed, on the ground, that he was working at two dollars a day. But the court was of opinion, "that an agreement, to receive a stipulated sum, per day," for services, would not, "of itself, make the plaintiff a journeyman, so as to deprive him of the lien."

And yet, in Jobson *v.* Boden, the claimant, who was a carpenter and millwright, not working under a master-workman, but employed by the contractor for the entire mill, was excluded. The only fact appearing in the report, which distinguished him from hundreds of others who have been employed by contractors and

[1] 8 B. 463.

retained their liens, being, that he was hired by the day.

These are all the cases that throw any real light upon a subject which must, hereafter, give much trouble, and require distinctions and definitions not yet announced.

There is another question which has been made, which affects all these classes, and which we must not pass by. It is not so likely to arise, in regard to those doing work, as to those furnishing materials; but it may be presented as to either.

The Act of 1806 gives the lien to certain mechanics and material-men, by particular designation, and to "any other person or persons employed in furnishing materials for, or in the erecting and constructing such house, or other building." Are this Act and those which have since been passed, to apply only to persons, whose regular and ordinary business is, to do the work, or furnish the materials for which a claim may be filed; or may any one avail himself of the law, without reference to his permanent or continuing trade or occupation?

In the case of Savoy *v.* Jones, a man filed a lien for bricks which he held and owned and had furnished to the house. He was not a brickmaker, however, and the point was made, that he could not, under the Act of 1806, file a lien, for that reason. It was argued, that the word "employed," used among the general words of the Act, meant one whose business it was to furnish the particular material. The court, however, sustained the lien. Gibson, Ch. J., in de-

livering the opinion, says:—"A lien is given in general and comprehensive terms, to every one, without distinction, 'employed in furnishing materials for, or in the erecting or constructing, of any house, or other building:' and I cannot imagine, why none but regular dealers in the article, or workmen bred to the particular craft, should have the benefit of it. We have mechanics who can turn their hand to anything; and there is the same reason for hypothecating the product of a bricklayer's labour, for wages earned as a carpenter, as there would be for wages earned in his proper vocation; and a dealer, *pro hac vice*, would seem to be as much within the reason of the law, as if he had no other business." [1]

If this was the construction of the Act of 1806, there can be no difficulty with reference to that of 1836, which is more comprehensive, still, in its terms.

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[1] 2 R. 343.

CHAPTER II.

OF THE NATURE OF THE DEBT SECURED BY THE LIEN.

The Act of 1803 gave the lien in respect of debts contracted "for or by reason of any work done, or materials found and provided," "for or in the erecting and constructing" of any dwelling-house or other building. The Act of 1808 contains the same general words. That of 1836 provides for "all debts contracted for work done, or materials furnished for or about the erection or construction" of the building.

The first question, that arises under this head is, what is included within the meaning of the word "building"? Being a word of more comprehensive signification than "house," or "dwelling-house," it, of course, includes them, and is, therefore, no doubt, used alone, in the latter Act.

It may, at first view, appear, that a consideration of the meaning of the word "building," would be more appropriate, in treating of "The subject of the lien." A closer examination, however, will show, that the building is the subject of the lien, only incidentally, and as a part of the land; that its most important aspect is in affecting the land, by giving rise to the debt; and that it is only by reference to the building, that the nature of the debt can properly be defined or described.

It has been expressly held, that a church is within

the meaning of the Acts.[1] And, in several cases, claims have been filed against buildings erected for this purpose.[2]

Claims have, also, been filed, without any objection, on account of the character of the building, against an Odd Fellows' Lodge,[3] a School House,[4] a Brewery,[5] a Distillery,[6] Stores and Warehouses,[7] a Theatre,[8] Mills of various kinds,[9] a Factory,[10] a Boiler and Engine House,[11] a Tan House,[12] a Furnace,[13] a Kitchen,[14] a Barn.[15] These cases have not, all of them, it is true, the force of express decision, but they serve to show the usage in this respect.

There are other cases in which questions have arisen with reference to the ordinary out-houses, connected with a dwelling. But to these we shall refer under

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[1] Presbyterian Church *v.* Allison, 10 B. 413.

[2] Beam *v.* First Meth. Ep. Church, 5 Law J. 286. Noll *v.* Swineford, 6 B. 187. Armstrong *v.* Ware, 8 H. 519.

[3] Babb *v.* Reed, 5 R. 159.

[4] Dickinson College *v.* Church, 1 W. & S. 462, Church *v.* College, 3 id. 221.

[5] Gray *v.* Holdship, 17 S. & R. 413.

[6] Yearsley *v.* Flanigan, 10 H. 489.

[7] Bruner *v.* Sheik, 9 W. & S. 119. M'Donald *v.* Lindall, 3 R. 492. Croskey *v.* Coryell, 2 Wh. 223.

[8] The case of the Olympic Theatre, 2 Br. 275. Mitchell *v.* Evans, id. 329.

[9] Wademan *v.* Thorp, 5 W. 115. Washburn *v.* Russell, 1 B. 499. Holden *v.* Winslow, 7 H. 452. Keppel *v.* Jackson, 3 W. & S. 320. Jobsen *v.* Boden, 8 B. 463. Morgan *v.* Arthurs, 3 W. 140.

[10] Church *v.* Griffith, 9 B. 117. [11] White's Ap. 10 B. 242.

[12] Anshutz *v.* M'Clelland, 5 W. 487. M'Clelland *v.* Herron, 4 B. 63.

[13] Hoatz *v.* Patterson, 5 W. & S. 537.

[14] Hampton *v.* Broom, 1 M. 241. [15] Werth *v.* Werth, 2 R. 152.

another head. They bear upon the point, whether the erection of such an appurtenant, could subject the main building to the lien, rather than upon their position as isolated structures, under the law, were the claim for work done upon them, only, and filed against them, alone.

But there is a case which it is, perhaps, proper to mention here.

In Barclay's Appeal, a claim was filed for work done for and about the erection and construction of a building "and appurtenances." The Court held the claim bad, and say: "But an appurtenance may be a yard, an alley, a cistern, a conduit pipe, an ice-house, a smoke-house, a privy, a stable or other out-house, distinct from the principal building mentioned in the written claim, and, consequently, not within the purview of the lien laws." [1]

If the court, by this decision, without reference to the question, whether such houses were, properly, appurtenances to the main building or not, meant to decide, that as isolated structures, they were not within the purview of the lien laws, it is in conflict with certain of the decisions we have mentioned, at least, with that of Werth *v.* Werth, in which a claim was filed against a barn for work done to it, alone; and upon the sale of the "plantation" upon which it was erected, and distribution of the proceeds, the court decided, "that the lien was to be confined to the building erected and the land covered by it, with all the necessary

[1] 1 H. 496. But see Gaule *v.* Bilyeau, 1 Casey, 523.

means of enjoying it, in the usual way," and appointed a commissioner to report the proportionate value of the building, in reference to the whole tract.

We find, in earlier cases, a claim filed, against buildings erected by or for the Directors of the Poor, and no objection seems to have been made, on the ground of the character of the building.[1] But it has been, since, expressly decided, that the public houses of a county, such as the court houses, public offices and public schools, are not within the meaning of the lien laws. This doctrine is not based upon the nature of the building, with reference to its use, or dignity, or in respect of size or construction, but upon grounds of public convenience and necessity, which would prevent any execution against such edifices, and, therefore, render nugatory any claim or proceeding thereupon.[2]

By an Act of April 16, 1838, the provisions of the Act are extended to "wharf-builders and all concerned in the making or constructing of the same."

By an Act of April 9th, 1849, which applies only to the counties of Columbia and Elk, the law is extended "to every fixture in and about iron works and mines, and to every bridge and building, where work is done, or materials furnished in the construction of such fixture, in and about mines or iron works, bridge or building, for any corporate body, or for a contractor

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[1] Church *v.* Davis, 9 W. 304. Davis *v.* Church, 1 W. & S. 240.

[2] Wilson *v.* The Commissioners, 7 W. & S. 197. Williams *v.* The Controllers, 6 H. 277.

in the employment of a corporate body." The provision is restrained, however, to cases of work done, or materials furnished, after the passage of the Act, or where, having been done before the passage of the Act, a lien was filed within six months after the last work was done, or the last materials furnished. The remedy prescribed for such a lien, unless it was one existing or allowed under former laws, is the writ of sequestration.

By an Act of April 21, 1854, the Act of 1836 and its supplements are "extended to the improvements, machinery and fixtures erected by tenants of coal lease estates, on lands of others, in the county of Schuylkill."

By an Act of April 21st, 1856, the same Acts are "extended, as fully as the same are now applicable to buildings, to every steam engine, coal breaker, or parts thereof, pump-gearing, hoisting-gearing, fixture or machinery, in and about mills of any kind, iron or coal works, coal mines and iron mines."

But, without reference to the use, size or dignity of the structure, if it be merely personalty, in its legal character, as to the parties concerned, it will not be a "building," within the meaning of the law.

In Church *v.* Griffith, the property of lessees for years of land, on which they were erecting a shovel factory, was sold by the sheriff under a writ of *fieri facias*. Mechanics who had furnished bricks and castings to the lessees, for the stacks and furnaces, claimed the proceeds, under their supposed liens. The court say:—"In Lemar *v.* Miles, 4 Watts, 330, we held, that a steam engine, set up by a lessee of salt works,

might be seized and sold, by an execution creditor, as personal property. In that case, the question was, in effect, between the landlord and his tenant, who benefited by having his debt paid out of the property; in this, it is between the creditors of the lessees, some of them claiming the property as leasehold, by virtue of mechanics' and material men's liens, and some of them claiming it, as unbound personal chattels. The building was erected on a lot, under a lease for years; and, being erected on a chattel estate, it was, itself, a chattel; so that the case is stronger, than if it were between the lessor and the lessee, in respect to whom, fixtures for manufacturing purposes, are chattels, only, for the encouragement of trade. In Dalzell *v.* Lynch, 4 W. & S. 255, a lease for years was held to be legally sold on a *fieri facias*, without inquisition or condemnation. The fixtures, in this case, are, consequently, to be treated as chattels, not only, in regard to the lessor, but in regard to every one else. By the Act of 28th of April, 1840, a mechanic's lien is restrained to the estate which the contracting owner had in the soil; but it is not perceived how a chattel interest in the soil can be subject to such a lien any more than how it can be subject to the lien of a judgment. The stat. Westm. 2, which, indirectly, gave the judgment creditor a lien, gave him execution of the debtor's lands, which subsequent interpretation fixed to be the lands held at the time of the judgment; the Act of 1836, which creates the lien in question, gave the mechanic or material man execution of the building to which he contributed his labour or mate-

rials, without regard to the *quantum* of the estate, held by the contracting owner; and, had the law remained on that foot, the plaintiff, in a case like the present, would have recovered the fee simple value. All the statutes on the subject before 1840, treated the estate to be bound, as a fee. The *scire facias* prescribed by the Act of 1836, and still in use, calls on the contracting owner to show cause why the debt should not be levied, not of his estate in the ground, but of the building; the judgment is, that it be levied of the building, and the *levari facias* commands the sheriff to levy it of the building. The notion, that a chattel can be bound by the lien, separate from the possession, has not been familiar to us all, and, consequently, could scarcely have been entertained by the legislature. The very name of the execution shows, that it was not; for though chattels may be sold on a *levari facias*, at the common law, it had never been used or prescribed, in Pennsylvania, for the sale of any thing but mortgaged land. The common law form of the writ is essentially different from the form of it prescribed by the Act of 1836. Moreover, the provision for setting off and selling a reasonable curtilage, with the building, presupposes the existence of a freehold interest in the soil, not a chattel interest on the surface of it. For this reason it was, that we held, in Holdship *v.* Abercrombie, 9 Watts, 52, that the lessee of a lot, who procured a building to be erected on it, for purposes of trade, subjected the fee simple of it to liens for labour and materials; and that the chattel interest of the lessee was not the thing intended to be bound.

The supplemental Act of 1840, was produced, not by that case, but by Bickel *v.* James, 7 Watts, 9, in which it had been determined, that a sale on a mechanic's lien, filed against a contracting owner, who held by articles of purchase, divested, not only, the equitable estate of the vendee, but the legal title of the vendor. There, however, the vendee had an equitable fee to be bound; and the legislature evidently intended to do no more, than subject it, exclusively, to the lien; in other words, to contract, rather than extend the surface of its operation. The principle of Holdship *v.* Abercrombie, had been asserted in Anshutz *v.* M'Clelland, 5 Watts, 487; yet the legislature did not move in the matter till four years had gone by; and what was its eventual enactment? No more, than, that the Act of 1836 shall not extend to any other or greater estate in the *ground*, on which any building may be erected, than that of the person in possession, at the time of commencing the said building, and at whose instance the same is erected.' Now, though a lessee has an estate in the land, it comprises no more than his interest in the term, and gives him, merely, a right to occupy the ground, for the time agreed, which is one thing, and not a right of property in the chattels put upon it, which is another. At most, he could only sell the use of them, for the term. The interest in the lease is a right of occupancy, and, hence, it is a chattel real; but fixtures, which are not part of the freehold, as to the lessor or any one else, are chattels personal, which cannot be bound as a part of the lessee's estate in the ground, even if his lease were

bound. That they were separate property, in this instance, is proved by the fact, that they were sold, on writs of *fieri facias*, by antagonist creditors. Were the tenant himself to sell his 'estate in the ground,' no more would pass than the *use* of the building and fixtures; and it is not easy to see how the sheriff could sell more. By selling the lease, he would part with no more than what he had derived from the landlord; not the chattels procured by him to make it available. At the extinction of the chattel real, in the one case, and in the other, the chattels personal would remain on the ground as the property of him who put them there. As to the property in contest, the consequence is, that the plaintiffs would not have been more secure, with a lien on the leasehold, than they are without it. The auditor made a distinction between such parts of the castings as were fixed, and such as might come under the denomination of tools; but as all were chattels, whether fixed or loose, it was a distinction without a difference. Against the landlord, the creditors might treat the fixtures as chattels; and they have, at least, an equal right to treat them as such, against those who do not even pretend to claim them as freehold. Strictly speaking, the question is not, whether the estate in the lease was bound by the lien, but, whether the absolute property in the building and materials was; yet as the cause has been argued on the broadest ground, it is proper to say, that nothing which is merely leasehold, is now within the purview of the Act of 1836. It might, perhaps, be thought politic and proper to extend such a lien to both; but to do so, would require

further legislation, which we are incompetent, if we were willing, to supply. The auditor's report, therefore, was properly corrected."[1]

It is, perhaps, proper to refer, here, to several prior cases, growing out of the same facts, which, apparently, conflict with this decision. In these, a tanner, a lessee for six years, erected a tan-house, for the purposes of his trade. In the latest of them, the question arose, and was discussed, what estate passed by a sale under a mechanic's claim, for work and materials for the tan-house, done and furnished, at the instance of the lessee. But the point was not made nor considered that arose in Church *v.* Griffith. If it had been, however, a distinction might have been drawn.[2]

In Haworth *v.* Wallace, Gibson, Ch. J., confirms the decision in Church *v.* Griffith, and says, in regard to M'Clelland *v.* Herron, that "no more was ruled than that a levy and sale of a term did not pass the fee."[3]

In White's Appeal, the sheriff, under a writ of *fieri facias*, had sold the interest of the lessee of certain coal mines, with the boiler, engine-house, &c., which he had erected. A mechanic claimed a priority, under his supposed lien for work done upon the boiler and engine-house. The lessee held under a lease for ten years of the right to mine coal, with the privilege of removing the structures erected by him, at the end of the term. The lessor reserved the right to farm the

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[1] 9 B. 118.

[2] Anshutz *v.* M'Clelland, 5 W. 487. Holdship *v.* Abercombie, 9 W. 52. M'Clelland *v.* Herron, 4 B. 63.

[3] 2 H. 121.

surface of the land, if he did not interfere with the operations of the lessee. The court held the structures in question to be only personal property, and refused to recognise the lien.[1]

It was, perhaps, with a view to meet such cases, in the locality designated, and to prevent the hardship to the mechanic under these decisions, that the Act of April 21st, 1854, extended the benefit of the Acts "to the improvements, machinery and fixtures erected by tenants of coal lease estates, on lands of others, in the county of Schuylkill, and to all mechanics and material men doing work and furnishing materials therefor," with the proviso, however, that the lien should only extend to the interest of the tenants therein.

We ought, further, to observe, however, in respect to the doctrine of these cases, that, from the language of the court, a different ruling would, probably, have been made, prior to the Act of 1840. In Church *v.* Griffith, Gibson, Ch. J., more than intimates, that under the Act of 1836, alone, a tenant of a leasehold interest could bind the freehold, by erecting buildings, even for the purpose of his trade.

The case of Gaule *v.* Bilyeau ought not to be omitted in this connexion. The person against whom the claim was filed, in that case, had leased the premises, for seven years, with the express privilege of purchasing a part of it, upon a designated ground rent, at any time within three years. The lessee erected the building which led to the lien, and, very soon

[1] 10 B. 252.

afterward, availed himself of his privilege of purchasing, and received a deed for the property. The court recognises the cases to which we have just referred, but distinguishes the one before it from them. Lewis, Ch. J., who delivered the opinion, says:— "But, in this case, the tenant had a right, by the contract, to take a certain part of the premises, particularly described, on ground rent, at an annual sum, fixed by the contract. No words of inheritance are necessary in an executory contract. It is sufficient, if it be manifest from the instrument, that a fee simple was intended to be conveyed. This was sufficiently indicated in the contract, and the parties, subsequently, carried it out, by a conveyance in fee, subject to the ground-rent agreed on. It is not likely, that the tenant would have erected the tavern-house, and out-buildings, if he had had no certainty of enjoyment, beyond the term of seven years. It was his right to a conveyance in fee, that induced him to cause the erections; and it may well be presumed, that it was also that right which the material-men relied on, when they furnished the materials for building on the premises. We are of opinion, that, at the commencement of the building, the tenant had an equitable estate in the land, which made the buildings subject to a mechanic's lien."[1]

In Walker *v.* Anshutz, it was contended, that a steamboat was within the Act. The court, however, ruled otherwise, saying: "The principle which governs this case, was settled in Jones *v.* Shawhan. If I can con-

[1] Casey, 523.

tract with another, to sell and deliver me a steamboat, at a day certain, there is no reason why he should have a lien on it, after having parted with the property, unconditionally, whether the boat be a new, or an old one, whether it be finished or unfinished, provided it answers the description in the contract; or whether the vendor had himself purchased it or built it, with his own hands. The statute was not made for such a case. Mechanics and material-men may follow the product of their labour or materials wherever they can find it. But the owner of a boat, built by himself, sells it as he would any other chattel, on the personal credit of the buyer, where he expressly takes no other security. If the personal responsibility of the buyer prove insufficient, the seller has made a bad bargain, and he has himself to blame, for not having taken the proper precaution; but he cannot resort to the security provided by the statute for a different class of creditors."[1]

Another question, that often arises, and to which we have already adverted, is, what incidents or appurtenants to a house are, in law, such portions of it, as to subject the house to a lien for work upon them?

Of course the furniture in a house is not provided, for or about its "erection or construction." And, on the other hand, the doors and window sashes, undoubtedly, are.

In an early case, it was held, that a copper kettle or boiler, in a brew house, was part of the realty, and

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[1] 6 W. & S. 520.

subject to the lien; and, as a matter of course, work upon it would have been held to be the basis of a debt, within the law.[1] In another, it was held, that the furnishing of burr millstones for a mill, constituted ground for a claim.[2] In another, work done upon a steam engine, to propel a steam saw-mill, was held to be within the Acts.[3]

But, in the case of the Olympic Theatre, it was held, that the stage and scenery were not subject to the lien, and that work upon them would not create a debt within the law.[4]

A reference to these cases will show, that the question, in most of them, was, simply, whether the particular subject upon which the work had been done, was, or was not, part of the freehold,—realty by accession. If it be, it seems right that it should not only pass by a sale under the lien, but that the work should be treated as the basis of a claim.

It is, perhaps, proper, merely, to notice here, the cases and the legislation in reference to plumbing, gas-fitting, grates, furnaces, &c., of which we shall treat subsequently, in this same chapter. They ought to be governed by the principle just suggested, except where it is excluded by the express words of some enactment.

A more difficult and complex question arises, where, what is claimed to be an incident or appurtenant to

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[1] Gray *v.* Holdship, 17 S. & R. 413.

[2] Wademan *v.* Thorp, 5 W. 115. [3] Morgan *v.* Arthurs, 3 W. 140.

[4] 2 Br. 285.

the house, is some structure, distinct, and more or less remote from it.

We have, already, referred to Barclay's Appeal, in which the question arose, whether a claim for work done, for and about the construction of a building and "appurtenances," was good, and in which the court say:—"But an appurtenance may be a yard, an alley, a cistern, a conduit-pipe, an ice-house, a smoke-house, a privy, a stable, or other out-house, distinct from the principal building mentioned in the written claim, and, consequently, not within the purview of the lien law."

This *dictum* is somewhat in conflict with other cases in the same court. Such a question had not been, expressly, made, before; but several previous decisions show what the general construction of the law had been. We have, already, referred to some of them, bearing indirectly upon the subject.

In Burt *v.* Kurtz, a claim was filed against certain premises, for the erection of a dwelling-house, rope-house, rope-walk and stable, and it was allowed.[1] In Hoatz *v.* Patterson, a lien was claimed for erecting a furnace, casting-house, stables and houses necessarily appurtenant thereto, and no objection was made on that score.[2]

In Lauman's Appeal, the claim was against a two-storied stone dwelling-house, Swiss-barn, wagon-shed, wood-house and wash-house, smoke-house and ice-house, upon a farm. No question was made as to the

[1] 5 R. 246.

[2] 5 W. & S. 537.

right to a lien for work upon such buildings. The only question was, whether it was not a case for apportionment. The court held it was not, and say: "But the reason of the enactment shows it was intended to apply, only to the case of separate and distinct erections, capable of, and intended for a distinct possession and enjoyment; looking to the mischief to be remedied, it is very obvious, the statute has no reference, whatever, to the necessary buildings of a farm, forming component parts of a common property, and which, for every beneficial purpose, must be occupied as one possession. The dwelling-house, barn, wagon-house, and other similar erections are but appendages of the farm, the principal thing, and built expressly with a view to its more perfect enjoyment. They are, therefore, to be considered as constituent parts of a whole, incapable of separation, without injury; and, consequently, were intended for a several occupation.

Such buildings, are, in every particular, unlike those which apparently joined, are, in fact, completely divided, each, of itself, constituting an object of distinct proprietorship and encumbrance. The one is aggregate; the other is segregate. The propriety of apportionment among the latter is manifest; its uselessness, as applied to the former, is not less so. For the reasons given it is apparent, a case like the present was not within the contemplation of the framers of the law. Though the language used, taken literally, may include it, yet, being without the circle of the mischief to be cured, it is, clearly, not embraced by the spirit of the Act. It, consequently, remains sub-

ject only to the prior statutes, which do not, imperatively, call for an apportionment."[1]

In a still later case, an old house was altered and added to; a new two-storied back building, and a new smoke-house, oven and privy were built. The court held that there was no lien, because the main building did not present a case of new erection and construction. If it had, for any thing that appears in the case, no doubt would have existed, that the out-buildings mentioned were appurtenances, and that the work upon them created a debt which was a lien upon the entire premises, jointly with the work upon the principal edifice.[2]

It will be seen, how entirely discordant from these cases the decision in Barclay's Appeal appears.

But in a case in the District Court for the city and county of Philadelphia, its doctrines were submitted to, and a distinction of some importance, made. The word "appurtenance" was found in the body of the claim, but a bill annexed showed that an ice-house was meant. The court say:—"It is true that the Supreme Court intimates that an ice-house, being an out-house, distinct from the principal building mentioned in the written claim, would not be within the purview of the lien laws. But, then, that involves a question of fact, whether the ice-house in question is distinct from the principal building. It may be attached to, and part of it, as much as a bath-house, a wash-house or wood-house. If the ice-house in question be distinct

[1] 8 B. 473. [2] In Re Howell, Landis's Appeal, 10 B. 379.

from the principal building, then, on the trial, plaintiff's bill will be reduced, if it is not a lien; or, at all events, it is there only, upon the ascertainment of the true state of the facts, that the validity of this lien can be truly determined."[1]

In the case of Gaule *v.* Bilyeau, the objection was made, "that the ten-pin alley, the fence, &c., were out-houses, distinct from the principal building mentioned in the claim, and were not within the purview of the lien laws," and the case of Barclay's Appeal was cited to support the point. But Lewis, Ch. J., says:—"The use of a part of the lumber for out-buildings does not defeat the lien."[2]

The whole subject is one of much difficulty. If a detached barn, smoke-house, ice-house or other such structure, be a "building," by itself, within the meaning of the Act, and it alone be erected, then a case similar to that of Werth *v.* Werth,[3] which we have already noticed, would, perhaps, arise, and the building be sold with so much ground, only, as was essential to it,—a most awkward and inconvenient result. If it be a mere incident or appurtenance to a main structure, and as such may lead by its erection to a claim against the entire premises, then the case of Werth *v.* Werth is not law, and an extent is given to the claim which must lead to very embarrassing questions. This latter view seems to follow from the language in Lauman's Appeal.

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[1] Killingworth *v.* Allen, 8 Leg. Int. 126.

[2] 1 Casey, 523.

[3] 2 R. 152.

Where such a building is in contact with and forms part of the main edifice, less difficulty can arise. It may be considered as one with the latter. If the former be attached to an old building, it is a mere addition, not the subject of a claim. If both be built together, the claim is joint against both.

We ought, here, to notice the 29th section of an Act of 1836, extending the law to "persons furnishing curbstone for the pavement of any building, as aforesaid, within the city and county of Philadelphia."

The next question to be considered, in commenting upon the words which define the nature of the debt for which a lien can be filed, is, what is meant by "the erection and construction" of a building. And this question has several aspects of much importance.

It is, often, very difficult to draw a distinction between a mere alteration or repair of an old building, and the "erection and construction" of a new one, intended by the Act. A lien is not given by the Act in case of mere repairs,—adding to or altering a building.

Some of the judges have endeavoured to express this distinction by abstract rules.

In the case of the Olympic Theatre it was held, that "if the principal part of a building is torn down and rebuilt, upon a liberal construction of the Act, it ought to be considered as creating a lien."[1]

In the case of Armstrong *v.* Ware, Lowrie, J., says: —"Where the structure of a building is so completely

[1] 2 Br. 284.

changed, that, in common parlance, it may be properly called a new building, or a rebuilding, it comes within the lien law."[1]

In Driesbach *v.* Keller, Sergeant, J., says:—"But a substantial addition of material parts,—a rebuilding upon another and larger scale, constitutes a new building, even though some portions of the old are preserved and incorporated in the new."[2]

It will not be uninstructive to examine the cases in which either the opinion or the leaning of the court has been expressed, with reference to facts bearing upon this question of building or repair.

In one of the earlier of them in the court of Common Pleas of Philadelphia county, the owner of the land purchased a building, partly brick and partly frame, which, after undergoing some repairs, was moved to the premises in question. A cellar was then dug under it and walled up, a new chimney built, and the house newly weather-boarded and plastered. King, J., said: "I am of opinion, that the case disclosed in the report, is one of a building 'erected and constructed' within the true intent and meaning of the Act of Assembly, securing to mechanics and others payment for their labour and materials. The frame originally purchased by Burling was a mere shell, and required all the labour and materials of the lien creditors to make it a habitation for man. It has been held, that 'if the principal part of a building is torn down and rebuilt, upon a liberal construction of

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[1] 8 H. 520.

[2] 2 B. 79.

the Act, it ought to be considered as creating a lien.' (*Case of Olympic Theatre*, 2 Browne, 284.) The case here contemplated is a rebuilding on the same site. If a frame removed from one lot to another, at a distance, that is newly weather-boarded and plastered, has a cellar dug and walled under, and a chimney erected in it, is not, for the principal part, 'rebuilt,' I am at a loss to understand what is so.

"But this is, substantially, a new building; the skeleton only of an old one, removed from its original site, entering into its composition. If new materials had been used in making the frame, although prepared off of the lot the building was intended to stand upon, no one, from the circumstance, would have questioned the lien of the mechanics. Now, what difference can it make, in point of common sense, if, instead of preparing a new frame for his house, a party purchases one ready made, and which had been erected on a former occasion, and at a different place. None, I apprehend, capable of producing the result, that in the former case the mechanics engaged in the building shall have a lien on the building for their labour, and in the latter not. This Act of Assembly ought to receive a liberal construction in favour of the meritorious class of citizens, the just claims of whose industry it is intended to secure. The case disclosed by the report is one fairly coming within its provisions, and a decision of it in favour of the lien creditors, does not disturb the doctrine, that for partial repairs no lien is created."[1]

[1] Burling's Ap. 1 Ash. 377.

In another case, in the Common Pleas of Lancaster county, it appeared that a large building was erected for a public store house, subsequently used as a tannery, and then as an academy. It was sold, and the land on which it stood was divided into seven lots, and purchased by seven different persons, six of whom built six adjoining dwelling-houses, by tearing out the wood work of the old structure, except the joists and roof, pulling down the whole of the front wall, running up new brick front and division walls, and making new windows, doors, chimneys, &c. These were held to be new erections.[1]

In Driesbach *v.* Keller, a new story was added to a one story house, which was lengthened, by the erection of a two story addition, the whole being twice the front of the old house. It was covered with a new roof, communications were made within, and a shed or porch added, around the house. It was held to be within the Act.[2]

In a still later case, the building in question was a church. The roof was taken off, the whole building was taken down, except three brick walls about eighteen feet high, viz., two side walls and one back wall, which were cut away about one half, for new window frames; the old materials were removed; a new front wall was put up, with a new foundation; the side walls were lengthened eleven feet, with new foundations, and the whole building carried up eleven feet higher, making it three stories high, having a

[1] Gilbert Hill's Est. 3 Pa. L. J. 323. [2] 2 B. 79.

basement room, church and gallery. Every part was built on a new and more extended plan, totally differing from the old plan. The building was plastered on the outside, so that no appearance of the old building remained. The written contract with the builder was, to make certain "additions and alterations." The District Court for the city and county of Philadelphia held it to be a mere alteration and addition, but the Supreme Court reversed its decision, and brought it within the Acts. Lowrie, J., says:—"The law gives a lien to mechanics on 'every building erected' by them; but not for adding to or altering an old building. The parties, in their contract, call this work additions and alterations; but is it properly so? Every part of the house was reconstructed, except a part of three walls, and, even in them, the openings are new. There must, necessarily, be cases wherein it is difficult to decide, whether work done is to be regarded as the erection or as the alteration of a building, unless we regard as an alteration, any building in which old materials enter as an element, which would be unreasonable. A saddle may be new, though old stirrups, and even some leather of an old one, be used in making it. A saw mill may be new, though it has an old water-wheel or forebay.

"Where the structure of a building is so completely changed, that, in common parlance, it may be properly called a new building or a rebuilding, it comes within the lien law. This is, sometimes, difficult to decide, and then it must be left to the jury. Under the evidence, here, the court might have decided, that it is a

case of a 'building erected,' within the meaning of the lien law, and ought not to have ordered a nonsuit."[1]

On the other hand, in Miller *v.* Oliver, the raising of a frame building, and putting under it a basement story of stone, was held not to be an erection or construction.[2]

And in Perigo *v.* Vanhorn, the front and back of an old three-story house were taken down to the first story, and a new brick front and back run up, four stories high, with new windows, frames and sashes. The partitions, stairways, and chimneys were taken out, the floors repaired, and new door-frames put in. The change made the house five stories high, the two upper stories being entirely new. A four-story addition was made, and the roof over the whole was new. It was held not to be within the Act.[3]

This was a much stronger case in favour of the mechanic, than Armstrong *v.* Ware, and, if it had come before the Supreme Court, as that did, the decision of the District Court for the City and County of Philadelphia might have been reversed.

In the case, In re Howett,—Landis's Appeal, the roof of an old house was propped up, and the front wall taken down and rebuilt on a new foundation, outside of the old one. A new roof was then put on. The whole inside work was taken out, except the floors, and the chimneys were taken down to a point below the garret floors. New door-ways were made, and new work was put in the old doors and windows.

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[1] Armstrong *v.* Ware, 8 Leg. Int. 124, 8 H. 520.
[2] 8 W. 514. [3] 2 M. 359.

The back and side walls, the floors, and the foundations of the old house remained. Adjoining the house, a new, two-story back building was erected, without a cellar, and a new smoke-house, oven and privy. The family removed from the house during the work. Coulter, J., in delivering the opinion of the court, held this to be a mere alteration and addition. He says: "If repairing an old house is within the Act, where is the line of distinction to be drawn? Will making a new door or partition give the mechanic and material-man a lien on the whole building and lot? How much of the old house must be pulled down, and of what extent shall the repairs be? Or, does the Act include every material repair?

"These are questions which the statute furnishes no indication of a criterion to judge by, and where judicial discretion and experience would be at fault. There are expressions in the opinion of this court, in the case of Driesbach *v.* Keller, delivered by Judge Sergeant, which would seem to include repairs within the meaning of the statute. But we look beyond the opinion to the case itself, which was, in fact, the erection of a new house. There was a small, one-storied house on the lot, and the owner built a new, two-storied house alongside of it, and took off the roof of the one-storied tenement, raised it to two, roofed it, along with the new one, and also new weather-boarded them. Now, there was a new house built, into which the owner removed, whilst the old one was being made part of the new. It is more consonant to reason, to hold, that the little old one followed the condition of

the new, than that the large, new one followed the fortunes of the old."[1]

In a late case in the District court for the city and county of Philadelphia, Sharswood, J., in delivering the opinion of the court, says: "It appeared the lien was for materials furnished towards certain additions and improvements made to a large Hotel, at the corner of Broad and Callowhill streets. A two-story wing for a barber's shop was put up at one end, and an existing wing, at the other end, was somewhat enlarged, and a new roof was put on the entire building. The plaintiff's lumber went to all parts of the work, and his claim was filed against and included the whole building. An undisputed fact, and which seems almost decisive, was, that the building was occupied and the business carried on while the improvements were going on. If the lien, in this case, can be sustained, then every mechanic who puts on a new roof may have a lien. The new wing does not seem to alter the case. There might, perhaps, have been a separate lien for that. But, here, there was no change pretended, in the general character of the building, as from a dwelling to a store, or *vice versa*, which was considered, in some of the cases, as constituting a new erection, within the Act of Assembly."[2]

In most of these cases, the court decides the question of new erection and construction, without expressing any doubt about its being, properly, a matter for its cognizance.

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[1] 10 B. 380. [2] Smith *v.* Nelson, 13 Leg. Int. 140.

In Perigo *v.* Vanhorn, the court, indeed, say: "There being no claim for an issue, here, the fact is submitted to our determination."[1] But, in Armstrong *v.* Ware, the court below, having the point distinctly before it, says: "We have, heretofore, decided, that the question, whether a building is within the Acts of Assembly relating to mechanics' liens or not, when the facts are undisputed, is, necessarily, a question of law. To hold otherwise, would produce the result, that one mechanic and material man might recover from the building, while another, with an equally good claim, be defeated by the different conclusions of two different juries. This would be a monstrosity in jurisprudence."[2]

In the Supreme Court, Lowrie, J., reversing the decision below, says, in speaking of this question: "This is sometimes difficult to decide, and, then, it must be left to the jury."[3]

In the later case of Smith *v.* Nelson, already referred to, the same judge who decided the case of Armstrong *v.* Ware, in the court below, with the views of the Supreme Court just mentioned, before him, says: "The authorities appear to be uncertain, as to whether this is a question of *fact* or of *law*. In Armstrong *v.* Ware, (20 P. S. R., 519,) in which this court had decided it to be a question of LAW, the Supreme Court merely say, 'that, where the structure of a building is so completely changed, that, in common parlance, it may be properly called a new building or rebuilding, it seems

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[1] 2 M. 359. [2] 8 Leg. Int. 124. [3] 8 H. 520.

within the Lien Law. This is, sometimes, difficult to decide, and, then, it must be left to the jury.' We do not, however, consider that case as having definitely repudiated the doctrine, that, wherever the facts are found, or are undisputed, the question, whether an alteration is of such a character as to constitute a new building, is a question of law for the court; and that, whether it is easy or difficult to decide. If this be not so, then it is plain, that some of the mechanics who have furnished work and materials, may lose, and others, may gain a verdict, according as different juries may form different opinions upon the same state of facts; and it is difficult to see, how the court can so regulate the matter, as to do equal justice to all claimants, between the interfering verdicts of different juries. It would be a monstrous solecism, if one of two mechanics, equally meritorious, should be decided to have a lien, and the other not, and the ground be, that the same building was considered to be, in the one case, within, and in the other, without the provisions of the same law."

We ought not to leave this subject, without quoting, further, the remarks of the judge who decided these cases of Armstrong *v.* Ware, and Smith *v.* Nelson, in the court below. They are found in the opinion in the former of the two cases, and may serve to aid in establishing some rules, by which these difficult cases may be disposed of more consistently. He says;—"It will be difficult to lay down any general rule on the subject. It certainly has not been done as yet. Every case will have to be decided upon its particular cir-

cumstances, until time and experience shall evolve some general criterion. One thing seems certain, that, if the outward appearance of the old building remain unchanged, however great the interior alteration and addition may be, there would be nothing to put purchasers upon inquiry for liens, and such a case would, clearly, not be within the Act. So also, though the outward appearance be that of a new house, if the shell of the building remain, and its purpose be the same, it ought not to be considered as an erection or construction."

A question, closely analogous to the one just considered, arises, even in the case of a new house, with reference to the time, when work must be done, or materials furnished, so that they may be considered as done or furnished for or about its erection or construction. The work may be done, or materials furnished, so long after all other parts of the house are finished, as to be treated, merely, as done, or furnished for an addition, not for a part of the continuing work upon an unfinished structure.

In the case of the Presbyterian Church *v.* Allison, a question arose as to bricks used for building a wall or curbing around the basement window of a church. The lien was sustained, for another reason, without a direct decision of the question, whether that was such a part of the building, as to be held to be work done in process of finishing it. The court say, however, "If after the building was finished, and notice given to the material-man, an application was made for brick to lay a pavement, or build a helping wall to

the edifice, that would furnish a question not existing in the case."[1]

And in Holden *v.* Winslow, the court say: "Whether the last work done by the mechanic was part and parcel of the original job, or not, depended upon evidence, and upon the finding of that fact the lien depended." "The question is, whether the topping out done by the mechanic was part of the original agreement, and was the crowning-work of his job, or not, and, whether it was done in due time, without unreasonable delay, by consent of Winslow; or, whether it was a distinct contract, entered into after his first work was finished."[2]

But we refer, for the rest of the cases bearing upon this point, to those chapters which treat of the commencement and continuance of the lien, particularly the latter.

A little reflection will make it apparent, that the additional or extra work, so separated from prior work upon the same building, as to form no part of the first erection or construction, may be, in one case, so insignificant, in respect of quantity, or importance, as to suggest no idea of a second erection or construction, but may, in another case, be half the work upon the house. In some decisions, the intermission has been entirely overlooked, and the two separated periods of work regarded as one; in others, the courts have been driven to the necessity of declaring, that, of the same

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[1] 10 B. 416.

[2] 6 H. 162, and see Harker *v.* Conrad, 12 S. & R. 303.

house, there may be two commencements, and two distinct erections and constructions.

What must be the character and length of such an interval, in order to sever one part of the work from another; how it is affected by change of title, by contract, and by other circumstances, we will discuss, as far as the cases permit us to do so, safely, in the chapter referred to.

But there are other aspects of this question of "erection and construction," which remain to be considered.

The Act of 1803, gave the lien for "work done or materials found and provided by any brick-maker, brick-layer, stone-cutter, mason, lime-merchant, carpenter, painter and glazier, iron-monger, blacksmith, plasterer and lumber-merchant, or any other person or persons employed in furnishing materials for or in the erecting and constructing such house or other building." This enumeration includes those who do work, those who furnish materials, and those who do both.

The words of the Act of 1806 were precisely the same in this respect.

It will be seen, that so much of the clause above cited as is general, refers only to material men, and not to those who do work upon the building. Only those mechanics, therefore, who were expressly enumerated, could have filed claims for work.

It was held, in consequence, in early cases, that the paper-stainer, paper-hanger and plumber were not within the Act.[1]

[1] Hurley *v.* Lybrand, and Rowley *v.* Lybrand, 1 Frank. Inst. J. 97, Wh. Dig. Title, Mechanics' Lien, pl. 66 & 67.

It will be observed, that, in this particular branch of the subject, the character of the building, and what is or is not part of it, or appurtenant to it, and what is realty by accession, are not involved. The nature of the work, alone, is in question.

In a case in the District Court, for the city and county of Philadelphia, the peculiarity of the earlier Acts was noticed. Stroud, J., in delivering the opinion of the court, says; "It was decided under the Mechanic's Lien Act of 17th March, 1806, that that Act admitted of no such claim,—Hurley *v.* Lybrand, 2 Whart. Dig. pl. 10, p. 252. The grounds of this opinion have not been transmitted. They are supposed to have been derived from the fact, that there is, in the enacting clause of the Act, an enumeration of certain mechanics and material men, such as brick-makers, brick-layers, stone-cutters, masons, lime-merchants, carpenters, painters and glaziers, iron-mongers, blacksmiths, plasterers and lumber-merchants, who, for the work done or the materials furnished by them, are declared to be entitled to liens, whilst no mention is made of a *paper-hanger*. This argument is entitled to much consideration; for, though this enumeration is followed by the more general language, 'or any other person or persons employed in *furnishing materials* for or in the construction of such house,' &c., yet, it is observable, that this language does not extend to *work* done, but is restricted to the furnishing of *materials*, by such other persons. *Paper-hangers*, therefore, not being in the enumerated class of protected mechanics, and the other language not comprehending claims for *work*

done, would seem not to have been within the purview of the Act of 1806."[1]

The Act of January 28, 1831, extends the Act of 1806, and its supplements, "to plumbers, for all work by them done, or materials by them found and provided, for or in the erecting and constructing of all and every dwelling-house or other building, and the hydrants and pipes appurtenant thereto, hereafter constructed and erected within the city and county of Philadelphia."

The Act of 1836, omitting any enumeration such as we find in prior Acts, extends the lien to "all debts contracted for work done, or materials furnished for or about the erection or construction" of the building.

Upon this subject the Commissioners say: "We have, in this section, omitted the enumeration of particular mechanics and material men, since the general words of the Act of 1806 seemed to render it necessary."

In the case of Freeman *v.* Gilpin, which we have already cited, the question arose as to paper-hangers, under the Act of 1836. The remarks which we have given were made in reference to earlier Acts, for the purpose of distinguishing them from the later one, and explaining prior decisions. In regard to the Act of 1836, Stroud, J., says:—"Here is no enumeration, but the expressions are as general as possible. And as there can be no doubt, at the present day, whatever may have been the practice formerly, that a *paper*

[1] Freeman *v.* Gilpin, 9 Law J. 426.

hanger does work and furnishes materials in the construction of a house, there seems no just ground for his exclusion from the benefits of this Act. New houses are seldom offered for sale, or to be let, until papered. When the Act of 1806 was passed, and for many years afterwards, the practice was otherwise. This change of circumstances, in itself, requires a corresponding application of the law."

The act of March 24th, 1849, expressly extending the Act of 1836 to paper-hangers, was in force at the time of this decision, and was referred to, as showing, that they could not have been embraced by the provisions of the Act of 1836. But the argument was not regarded.

The 29th section of the Act of 1836 extends the lien to "plumbers and persons furnishing curbstone for the pavement of any building as aforesaid, within the city and county of Philadelphia."

The words "within the city and county of Philadelphia" were not in the original draught reported by the Commissioners. The rest of that section, however, was theirs; and they say, in regard to it: "The concluding section extends the provisions of the Act to plumbers and persons furnishing curbstone, and follows, in this respect, the Acts of 1818 and 1831. It seems proper to provide for them, specially, here, as they are not, necessarily, included in the general terms of the first section."

An Act of April 24th, 1843, extended this section to Northampton county; an Act of May 6th, 1844, to the city of Lancaster; an Act of January 23d, 1849,

to Chester county; and an Act of March 24th, 1849, extended the lien to plumbers in Chester county.

By an Act of April 14th, 1855, the provisions, generally, of the Act of 1836, are extended "to plumbing, gas-fitting, and furnishing and erecting of grates and furnaces."

Notwithstanding these Acts, however, questions must, hereafter, arise, under the general words of the Act of 1836, above mentioned, as to the work of particular artisans, and its relation to the structure, such as that presented in Freeman *v.* Gilpin, to be decided on the principles there suggested.

For the basis Act of 1836 no longer names particular mechanics, but leaves, for each case, the question, whether the work done, or the materials furnished, are of such a nature, that they can be said to be done or furnished "for or about the erection or construction" of the building.

But there is another requisite involved by the words "for or about the erection or construction," &c. The work must be done, or the materials furnished, upon the credit of the house.

In Hills *v.* Elliott the court show, very clearly, the importance of this doctrine of credit, or intention; of the purpose and understanding, that the work and materials are for the building, and bind it. They say; "A lumber merchant purchases, on credit, one hundred thousand feet of boards, to sell and make profit. He changes his intention, and erects two or three houses, and uses half of the boards therein. If his creditor, for this lumber, has a lien on those houses,

he has what neither himself, nor the buyer, nor, as I believe, the Legislature ever intended."[1]

The question of a credit to the house arises, most frequently, of course, with reference to materials furnished. Whatever may be the belief and intention of the person supplying them, and whatever his reliance upon the person who gives the order, they are, upon a delivery to the latter, subject entirely to his disposition. From a change of purpose, or a fraud, he may never use them in the house. Is the lien of the material man to depend upon his ulterior purposes?

There is nothing in the Act requiring, that the materials should be actually used in the building. It is sufficient if they are furnished "for or about the erection or construction."

In an early case, the lien of a lumber merchant was sustained, though the lumber was not used. The Judge who presided in the District Court, for the City and County of Philadelphia, charged, upon this point, as follows: "Was the debt contracted, and on account of the building; and was it delivered at, or near the premises, with an intention to be used therein? If it was, Wallace has done every thing to entitle him to his lien, and it would be hard to allow him to be defeated by any act of Melchoir's in which Wallace had no participation.

"If you are satisfied, that Wallace's debt was contracted *for*, and on the *credit* of the building; and that the lumber was delivered *at* or *near* the building,

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[1] 16 S. & R. 58.

at the place pointed out by Melchoir, *with an understanding of the parties that it was to be used in the erection thereof:* if, after that, Melchoir did not use the lumber in the building but, without the knowledge or consent of the plaintiff, sold it to other persons, still, Wallace had a lien on the building, for his debt."[1]

In Hinchman *v.* Graham, Tilghman, Ch. J., says:— "I was once inclined to think, that the lien might be restrained to the materials *actually used in the building*, but, on reflection, I find that such a construction is not warranted by the words of the law, and would operate unjustly on those who furnish the materials; for, how can they tell the exact quantity that the building will require, or what control have they over the purchaser, after delivery?" and again, "the merchant, having sold and delivered the materials, for the purpose of being used in the building, could do no more. It would be unjust, therefore, to throw upon him the risk of their future application." And the remarks of Yates, J., in the same case, are equally clear and direct, and still more positive.[2]

In Harker *v.* Conrad,[3] the same doctrine was held by the court below, without any disapproval by the Supreme Court. In Church *v.* Allison,[4] also, the earlier cases, as to this point, are sustained. And in Witman *v.* Walker, the court, expressly, say: "The right to obtain a lien is given by the Act of Assembly to all debts contracted for work done or materials furnished for or about the erection or construction of the

[1] Wallace *v.* Melchoir, 2 Br. 104.
[2] 2 S. & R. 170.
[3] 12 S. & R. 303.
[4] 10 B. 416.

building, and that, whether the materials are actually used in it or not."[1]

But what is, then, the furnishing "for or about" the erection and construction of a building, which forms the basis of the debt, without reference to what is actually done with the materials; in fact, even if they are not so used.

In Hinchman *v.* Graham, the court makes the test of coming within these words, that the lumber was furnished "for the purpose" of being used in the building.

In Hills *v.* Elliot, the court say:—"The materials must be furnished on the credit of a particular house. Such must be the understanding at the time."

We shall, hereafter, in treating of the subject of evidence, present the cases which bear upon the mode of showing this "purpose" or "credit,"—the proof to be adduced by the plaintiff, on the trial.

The question has often been made, how far special agreements between the mechanic or material man, and the contractor, affect the position of the debt. It has two aspects, one having reference to the question whether a lien ever existed, the other to its extinguishment after it had begun. It is to the former of these, that we shall now turn our attention. The latter we shall consider, in treating of the nature of the lien.

None of the earlier decisions intimated, that a special contract endangered the lien. On the contrary,

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[1] 9 W. & S. 186.

they tended to establish, affirmatively, the opposite doctrine.

In Hinchman *v.* Lybrand,[1] a brickmaker made a special agreement, in writing, with the owner, by which he agreed to furnish the bricks for two houses, to be paid for, partly, in cash, at a certain fixed time, and, partly, in lumber, at fair prices, when called for; which agreement was guarantied by a third person. It was held that the brickmaker had a lien.

Under another head, we shall refer to numerous authorities showing, that a taking of a bond, or a note, or even the entering or obtaining of a judgment, for the same debt, is not a waiver, release or extinguishment of the lien. If this be so, of course, the taking such a security, in contemplation of the debt, but before the lien attaches, ought not to interfere with its validity.

In M'Call *v.* Eastwick, the plaintiff, who was a carpenter, agreed with the defendant, who was a plasterer, that each should do work upon the other's building, of his particular kind, and when both had done, a settlement was to be had. The court sustained the lien.[2]

In a case of Shaffer *v.* Hull, in the Common Pleas of Lancaster county, Lewis, J., held that where the contractor was a carpenter as well as a lumber merchant, and his contract was confined to matters within the lien of his own business, he had a lien, notwithstanding a special agreement.[3]

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[1] 14 S. & R. 32.

[2] 2 Miles, 45. See Croskey *v.* Coryell, 2 Wh. 223.

[3] 3 Pa. L. J. 321.

In Havilland *v.* Pratt, a lien was sustained, though it was agreed that the work was to be paid for in a house.[1]

But in the case of Haley *v.* Prosser, for the first time, the doctrine, was announced, that a special agreement, under all circumstances, deprives the party of his lien. "We have, heretofore, ruled," say the court, "that where there is a special contract with the owner, the party who dealt with him must provide for his own security; but, that where there is no agreement in which the terms of the bargain are particularly stated, he is supposed to contract on the basis of the law. Indeed, the specification required by the statutes of "the nature or kind of work done, or the kind and amount of materials furnished, and the time when the materials were furnished, or the work was done," is inapplicable to a lumping case, in which the party has contracted for a round sum, or, as in this case, for a given number of bricks. The object, originally, in the contemplation of the legislature, was, to secure those who furnish labour or materials to a mere builder, without knowing the owner, or having an opportunity to secure themselves; but the words of the law are certainly applicable to cases in which the owner is his own builder. Where, however, the rights and responsibilities are defined by a bargain, neither is at liberty to claim any thing beyond the terms of it."[2]

This decision was a surprise to the profession. And the idea, that the original design of the legislature was, to favour those who did not know the owner,

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[1] 9 Leg. Int. 98.

[2] 8 W. & S. 134.

seems somewhat in conflict with the words of the Act of 1803, construed by the case already cited, of Steinmetz *v.* Boudinot, which forbid a lien for any debt not contracted directly with the owner. Gibson, Ch. J., in speaking of decisions prior to that of Haley *v.* Prosser, said, that it had not, at that time, ever been determined, that a mechanic or material man could not file a claim, where he had made a special contract; and, that no more had been decided, than, that the master builder or contractor could not file a claim for his services and skill.[1]

The decision in Haley *v.* Prosser, probably, led to the passage of the Act of April 16th, 1845, which enacts: "that the provisions of the Act" of 1836, "according to the true intent and meaning thereof, extend to and embrace claims for labour done and materials furnished and used in erecting any house or other building, which may have been, or shall be erected under or in pursuance of any contract or agreement for the erection of the same; and the provisions of the said Act shall be so construed; and no claim which has been or may be filed against any house or other building, or the lien thereof, or any proceeding thereon, shall be, in any manner, affected, by reason of any contract having been entered into for the erection of such building; but the same shall be held good and valid, as if the building had not been erected by contract: Provided, that no case shall be affected by this section which may have been decided

[1] Bolton *v.* Johns, 5 B. 157.

by the Supreme Court, or in which the proceeds of the sale of any real estate may have been distributed by the decree of any court from which no appeal has been taken."

Several decisions have been had bearing upon this subject, since the Act, which we need only refer to. The only one of them which needs comment, perhaps, is that of Johns *v.* Bolton, in which Gibson, Ch. J., seems to throw out a doubt, whether the Act in question applies to sub-contractors. But there is so little that is definite in the opinion, on this point, that we cannot safely do more than call attention to it. The words of the Act, however, are not free from doubts and difficulties of construction.[1]

It is, perhaps, proper lest they should have escaped attention, to refer, again, to the cases in which it was held, prior to the decision in Haley *v.* Prosser, that a debt may be the subject of a claim, although it be payable in lumber, or in a house.[2]

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[1] Young *v.* Lyman, 9 B. 449. O'Brien *v.* Logan, 9 Id. 97. Bolton *v.* Johns, 5 Id. 145.

[2] Hinchman *v.* Lybrand, 14 S. & R. 32. M'Call *v.* Eastwick, 2 M. 45. Havilland *v.* Pratt, 9 Leg. Int. 98.

CHAPTER III.

WHO MAY PLEDGE THE CREDIT OF THE BUILDING.

By the Act of 1803, as we have seen, no building could be bound except for the payment of a debt contracted by "the owner or owners thereof." And in the case of Steinmetz *v.* Boudinot, it was expressly held, that where the owner made a contract with another, to build his house, and that other engaged or employed mechanics or material men, he did so upon his own credit, and not upon that of the building.[1]

The question how far, in such a case, the contract of the builder was, under the usual law of agency, really the contract of the owner, does not appear to have been made, either in that or any other reported case.[2]

Subsequent enactments relieved the system of this difficulty, by omitting the words above quoted; and the Acts of 1808, and 1836, expressly, recognised a debtor or contractor, who might charge the building, and, yet, not be the owner.

It is singular, that the question did not sooner occur, whether such a contractor must be one whose contract extends to the whole building, or whether a sub-contractor, for a portion of the building, could bind the owner and his estate in the same manner.

[1] 3 S. & R. 541, and see Jones *v.* Shawan, 4 W. & S. 264.

[2] But, see, Campbell *v.* Scaife, 8 Leg. Int. 74.

In several cases, which are cited in the decision which we are about to notice, the similarity of the positions of the contractor and sub-contractor, with a view to their rights of lien against the owner and his building, was discussed. But the question, whether the sub-contractor pledged the credit of the building, when he employed mechanics or ordered materials, and whether he was a "contractor," within the meaning of the Act of 1836, who might be joined in the claim, and made a party to the proceeding, seems not to have come directly up, until this case presented itself.

We refer to the case of Derrickson *v.* Nagle, in the District Court for the city and county of Philadelphia, in which a claim was filed against an owner and contractor, the latter being merely a sub-contractor, to "furnish or put up all the marble mantels." In this case the claim was sustained. But, Sharswood, Pr. J., in delivering the opinion of the court, says:—"Were this *Res integra*, we should be disposed to hold, that no one but a 'contractor, architect, or builder,'—(these words being evidently used in the Act of Assembly as synonymous,) has authority to pledge the credit of the building. Many reasons may be urged to show the inconvenience and injustice of any other interpretation. The owner who erects a building by contract is environed with great perils, but these are multiplied, beyond measure, when he is, himself, the architect, and gives out the different parts of the work to different mechanics.

"Not only may he be made to pay twice for the same

thing, but his terms as to price, &c., will, of course, not be binding upon the mechanic, who is not privy to the original contract.

"We have found it impossible, however, to reconcile such a position with the authorities. In Witman *v.* Walker, 9 W. & S. 183, the plaintiff, below, was a contractor, in the same position as Brown. He had contracted to do all the marble-work. It was held, that he fell within the principle of Jones *v.* Shawan, 4 W. & S. 417, and Hoatz *v.* Patterson, 5 ibid. 537, and was not entitled to file a lien. 'It is not easy to perceive,' says Judge Sergeant, 'any difference, in principle, in the circumstance, that the contract is not for the whole building, but for a particular job or piece of work, as here, to put up the marble-work for two houses, and furnish marble mantels.' The relation of the parties is the same, and similar inconveniences and incongruities would ensue, to those pointed out in the opinion delivered by Mr. Justice Rogers, in Jones *v.* Shawan, if the same individual might stand in the double capacity of contractor and material man.' Mr. Justice Rogers does not deliver any opinion in Jones *v.* Shawan, but he does in Hoatz *v.* Patterson, 5 W. & S., 538, and in that he says: 'There would, in either case, be the same inconvenience arising from double liens and double recoveries, and the same incongruity in the same person being both plaintiff and defendant.'"[1]

But the question, who may pledge the credit of the

[1] 13 Leg. Int. 158.

building, has other and more difficult aspects. It is proper, that one who is employed by the owner to erect a house, should not be made an instrument, as he was under the Act of 1803, of enabling him to evade the liens of those who are employed in the construction. But there are cases in which the owner of an estate in the land, not only, has no relations, directly or indirectly, of a contract character, with the structure, or those employed upon it, but would prevent its progress, if he could. Thus, the owner of a life estate, or other particular estate, builds; can he charge the estate of the reversioner or remainder man; does the lien to which he gives rise bind the fee? A lessee erects a dwelling upon the premises demised to him, will a sale under the lien of one of his mechanics carry the absolute estate to the purchaser? A trespasser constructs a house, can he enable the persons whom he employs to charge the title of the real proprietor? These are questions which have all been settled by authority.

It was early decided, that this lien arose from a credit given to the building, and not to the owners, and that as remainder men and reversioners were benefited by its erection, their interests were, properly, bound by the lien.[1] And where the owner of an equitable estate, in possession, employed the mechanics, it was held that the legal estate was bound. [2]

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[1] Savoy *v.* Jones, 2 R. 350. But see Barnes *v.* Wright, 2 Wh. 293; and 2 Wash. C. C. R. 33.

[2] Bickel *v.* James, 7 W. 9.

So, in the case of a lessee, a like doctrine was announced.[1]

These cases must be carefully distinguished from others, in which it has been held, that erections by a tenant for years, for the purposes of trade, or under an agreement to remove them at the end of his term, being merely chattels, do not subject the premises to a lien. The latter cases, of course, would not apply, where the structure was, in fact, realty, though the lessee might be the person who procured its erection.[2]

The supposed hardship of these doctrines to remainder-men and reversioners, owners of legal estates, and lessees, led to the Act of 1840, which enacts that the lien "shall not be construed to extend to any other or greater estate in the ground on which any building may be erected, than that of the person or persons in possession, at the time of commencing the said building, and at whose instance the same is erected," &c.

But the decisions which led to this Act did not reach the case of an erection by a mere intruder. It might, indeed, in some cases, benefit the owner of the better title, and the mechanic might have given implicit credit to the building; but it would be a hardship not to be borne, that the owner should be affected by a mere trespass. The point has never been expressly decided, but in the case of Bickel *v.* James, already referred to, Gibson, Ch. J., seems to presume strongly against the lien in such a case.[3]

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[1] Holdship *v.* Abercombie, 9 W. 53.

[2] See cases cited *ante*, p. 87, &c.

[3] 7 W. 9.

In the case of Bruner *v.* Sheik, it was held that an insurance company, building in discharge of its duty, under a policy of insurance, could not enable the mechanics to affect the premises with their liens.[1]

We shall refer to most of these decisions, more particularly, hereafter.[2] It is manifest from their tenor, that, even prior to the Act of 1840, it was the safer course, for the mechanic or material man, to see to the title of the person upon whose land he was building. Since that Act, this duty is most manifest.

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[1] 9 W. & S. 119.

[2] Part III., ch. 3.

PART III.

OF THE SUBJECT OF THE LIEN.

CHAPTER I.

OF THE SUBJECT OF THE LIEN, AS RESPECTS ITS NATURE.

The primary object of the legislature seems to be, to give to the mechanic and material man security for their debts, by pledging to them the subjects of those debts, themselves; viz.: the materials wrought up, or constructed into a building.

The first necessity of this object seems to be, that the lien should attach itself to each part of the materials, as soon as delivered, whether used or not, and to each part of the work, as soon as it is finished, whether it exists in the form of a building, or has not yet reached that position.

We have, already, referred to the cases which establish, that a lien may exist in favour of the material man, who furnishes materials in good faith, on the credit of the building, although they are never used in the building; and no doubt the rule is the same with reference to work upon those materials.

In such a case, the law often goes one step further,

to aid the classes which it protects, and gives them a lien on work and materials to which they have not contributed. They are secured by a house, into which neither their work nor materials have gone, because of a credit given to it.

But in what position are the work and materials not used, if found and distinguished? Where they have been appropriated to some other structure, the lien upon them is lost, perhaps, owing to the interfering rights of another set of creditors. But, if they still exist in kind, improved by labour, or as they were when furnished, what has become of the liens upon them? Suppose they continue in the hands of the contractor, on the ground where they were to have been used, or elsewhere, what is their legal position?

In the case of White *v.* Miller, the main question presented seems to have been the one to which we have already referred, whether the materials must be actually used in the building, or not, in order to allow of a lien. A portion of those furnished, there, were levied upon and sold, under an execution against the contractor, on the ground on which the house was erected. The Court say: "If, then, the lumber was furnished on the credit of the building, and not of the contractor, it is not easy to understand, how it could be *seized* and sold by his creditors. The title to it was vested, by the delivery, not in him, but in the proprietor of the building, subject, only, to the revindication of the seller. The ownership of it, between the time of delivery and of working it into the building, could not be in the contractor, because it was delivered to him, not on his own credit, but on the cre-

dit of the building to which it was destined. It was sold for the building, and, consequently, to the owner of it. He had power to protect it from the contractor's creditors, and he cannot charge his inactivity to the material-man, who had nothing to do with it. The ownership had passed by the delivery, and the building had become debtor for the price. The application of the lumber to the building was to be seen to by the owner of both."[1]

If this case means to decide that materials, in such a condition, are subject to the lien of the mechanic or material man, and that they cannot be, in law, as between the parties, withdrawn from it, even to satisfy the creditors of the person who is, in fact, the debtor for them, another doctrine must be invoked, to enable the claimant to reach them. The process given by the Acts is of a nature adapted to levy upon realty, only, and to give him relief, it would, perhaps, not be straining the principles of the law, to treat such materials as, constructively, realty, portions of the house upon the credit of which they were furnished.

Where the materials, however, have not only, not been used, but no house at all has been erected, such a construction would lead to very embarrassing results.

Another necessity of the desire to enable the mechanic, or material man, to follow his own work or materials, is, that he should follow them in their new form and position. A lien is, therefore, given upon the house erected.

[1] 6 H. 54.

But as a sale of the house, alone, would be, generally, an idle and profitless course, a third necessity of the protection sought, is, that the lien should extend to the land, also, upon which the house is erected.

It was contended, as we shall see, more fully, in the following chapter, at an early period in the history of the law, that the building, only, was affected by the lien, and that it did not extend to the soil beneath. This view, however, never received the serious countenance of the courts. The land has, always, been considered as bound with the house, and is, in fact, the substantial subject of the incumbrance. This is the practical result of following the work and materials.

But as the land can only be charged, through the building erected upon it, and, as the description of the land, as a subject, depends, therefore, to a very important extent, upon the building, it is, always, necessary, first to ascertain the character of the building which can so affect the land.

We have so fully discussed this topic in the chapter upon the nature of the debt which forms the basis of the lien, that we may refer to it for all the information which is afforded by the cases. Of course, wherever a building is of such a character, as to bring the debts to which its erection gives rise, within the Acts, it becomes, itself, a proper subject for the lien; and, on the other hand, buildings which are not of a character to create a lien, under the Acts, such as public buildings, and mere chattel structures, erected by lessees, for purposes of their trade, are, for a like reason, excluded from the operation of the law.

CHAPTER II.

OF THE SUBJECT OF THE LIEN IN RESPECT OF ITS EXTENT.

In the earlier Acts the "dwelling-house or other building," was made subject to the lien.

In a case decided more than forty years ago, the point was made, that nothing, but the house or building, was liable; that the lot was distinct; and that where both were sold, some mode must be devised, to ascertain their respective values, and distribute the money accordingly. This case arose in the court of Common Pleas, of Philadelphia county, and Rush, President J., in delivering the opinion, says:—"It is obvious, that this special claim of the lien creditors, must be determined, on a sound construction of the lien acts, and on established principles of law. There can be no question as to the view of the legislature, which certainly was to give the lien creditors every possible benefit arising from the house or building, as a fund for the payment of their demands. The project of selling the house, without the lot, would, in a great degree, if not entirely, destroy the fund provided by the legislature. The security and preference given to them would be a shadow, instead of a substance. The titles to real property would be infinitely perplexed, by a proceeding of this kind. One person would own the house,

and another the lot. In case the *house*, only, were sold, the purchaser would have no right to a foot of the adjacent or surrounding ground, and the owner might build against his doors and windows. It is impossible to trace all the mischiefs resulting from this new-fangled title. Upon general principles of law, we are, also, of opinion, that the lien creditors have a right to sell both house and lot. A grant of the profits of land is a grant of the land. A grant of a pool of water is a grant of the land which it covers; 1 Inst. 5, 6. So a grant of a *house* is a grant of the lot, and the curtilage. Upon this principle a lien on the house, in the present case, is a legislative grant of both house and lot, to the grantee. When a man grants to another a lien or mortgage on his house, it is, in law, a lien or mortgage on the lot also.

"On the supposition, that the law has given the lien creditor a right to sell nothing but the building, look, for a moment, at the consequences. The owner of a lot, after building upon it a valuable brick house, finds himself unable to pay for it, and is indebted to no creditor, except the tradesmen and mechanics employed in erecting it. If the building, alone, is to be sold by the lien creditor, it will, necessarily, sell for a trifle, *without the lot;* and the debtor has only, to get some friend to purchase it, for his use, and he will practise a complete fraud on all his creditors."[1]

In Bickel *v.* James, the court say; "But the pro-

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[1] Browne *v.* Smith, 2 Br. 229, (note.)

ject of the Legislature, in the preceding Acts, has been, as it still is, to secure to the mechanic or material man the fruit of his labour or materials, by selling the building, of which it happened to be a component part, without regard to the ground. The latter was a subject of so little consideration, as not to have been mentioned, in either of them; and, that it is sold as an appurtenance of the building, is, because it could not be severed from it." "Were the building sold without the ground, the interest in the freehold would not be disturbed; but, as that is impracticable, a consequent loss may, sometimes, have to be shared by claimants, under the same title, of separate interests in the fee."[1]

There seems to have been no doubt, therefore, prior to the Act of 1836, that the ground, on which the building was erected, was subject to the lien, with the building. Whether the building be the principal, and the land the incident; or the land the principal, and the building the incident, within the meaning of the law, is, perhaps, not a matter of direct importance.

But, upon the establishment of this doctrine, another difficulty arose. It appears to have been contended, gravely, that only the actual surface upon which the building stood, was affected, not any of the surrounding soil, or of the appurtenances. But this, like the first objection, was soon settled in favour of the mechanic.

In a very early case, a court had been laid out, for

[1] 7 W. 9. And see Holdship *v.* Abercombie, 9 W. 52.

the use of certain houses to be erected. A lien was filed against one of them, which included the court. It was held, that the court was a necessary appurtenance to the house, for the use of which it had been opened, and that it was properly embraced in the description in the claim.[1]

In the case of Werth *v.* Werth, claims were filed, for building a stone barn, on a plantation. The latter was afterwards sold, and the proceeds were for distribution among lien creditors. A question arose, as to the part and proportion of the fund raised from the whole plantation, to which the mechanics were entitled, and the mode of ascertaining it. The court of Common Pleas decided, "that the lien was to be confined to the building erected, and the land covered by it, with all the necessary means of enjoying it, in the usual way, and that the liens were first to be paid, and the residue of the purchase money applied to the judgments, according to their priority;" and appointed a commissioner, to report the liens, and the proportionate value of the building, in reference to the whole tract, which proportionate value, was to be paid to the mechanics, *pro rata*, and, if there were any residue, it was to go to the judgment creditors. The Supreme Court, in error, approved of this course, and affirmed the judgment.[2]

In the case of Pennock *v.* Hoover, the court say: "that, by a literal construction of the Act of 1806, it may be made a question, whether the lien can be ex-

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[1] M'Ilhenny *v.* Pratt, 1 Journ. of Fr. Inst. 214. [2] 2 R. 152.

tended beyond the ground actually covered by the house or building; because, by the words of the Act, it is the *house* or *building*, that is made subject to the payment of the debt, and no mention, whatever, is made, even of the land or ground upon which it stands. It is, therefore, only, by a liberal, or perhaps, more properly speaking, a reasonable construction, that the lien created, under this Act, can be made to embrace any land not covered by the buildings. And, although it may be necessary in order to carry into effect what seems to have been the intention of the legislature, as manifested throughout the Act, to extend the lien to land beyond what may be covered by the buildings, yet, there must be some reasonable limit, in this respect; and here, it appears to me, that the purpose of the legislature will be fully satisfied, by extending the lien beyond the ground covered by the buildings, to as much more as may be necessary for the convenient occupation and enjoyment of them, according to the intention and design of the owner, at the time of their commencement. This would seem to be giving to the party all the security that was intended by the Act; and, any thing short of this would, perhaps, in most instances, render it very ineffectual. In this case, the Auditor has made a division of the ground, allotting to each house, not only, what would seem to be as much as is usually occupied as a curtilage to such houses, placed in a similar situation, of the county or city of Philadelphia, but, all that the owners of the houses had intended should be used as appurtenant

thereto, according to his plan of improvement, as indicated by the work done upon the ground itself."[1]

In the report of the Commissioners, which we are about to give at length, a case of M'Donald *v.* Lindall, was mentioned, as tending to throw some doubt upon this subject. The remarks referred to are probably those of the court, where they say: "How far the words in the description in the lien filed can go, in affecting property contiguous to, and not covered by the building," "we do not now decide."

But all that was, really, determined by that case, was, that where the claim did, in fact, describe the surface which the claimant desired to affect by his lien, he must be confined to his description, and could not claim more, because the law would have allowed more, if he had included it.

In their report, the Commissioners say, upon this subject: "The second section is new, in terms, and has been introduced, for the purpose of removing a difficulty, which arose, very early, after the passage of the Act of 1806. That Act says, 'every dwelling-house, or other building, shall be subject,' &c. These words give no lien to the mechanics, &c., upon the *ground* or land occupied by a building, or adjacent to it. The rule of the common law is, that the ownership of the soil carries with it every thing erected upon it, except under special circumstances; and it has never been supposed that the reverse of this, viz., that a right of lien upon a house affected the owner-

[1] 5 R. 314.

ship of the soil, could be sustained upon any sound principle. It is plain, however, that a lien upon a *building, merely,* without any ownership in, or control over the soil which it covered, would be of little avail to the mechanic, even if the ground under the building were supposed to pass with it. The value of the building would be trifling, in most situations, if deprived of the use of the ground immediately adjacent to it. Other creditors, however, holding mortgages or judgments, disputed the right of lien creditors, under this law, to more than the mere building, or, at all events, to more than the ground actually occupied by it. The construction given by the courts of Philadelphia to this provision, was, perhaps, not free from objection; but it certainly tended to give efficacy to these liens, which it was the design of the legislature to encourage. They held, that the lien attached, not only to the building, and the ground occupied by it, but to so much of the adjacent ground as was necessary and proper for the ordinary purposes of the building. The practice of many years has been in accordance with this view of the law. A recently reported decision, however, of the Supreme Court, at Pittsburgh, (M'Donald *v.* Lindall, reported in 3 Rawle, 492,) has tended to throw some doubt upon the correctness of the present construction of the Act, and, at all events, the uncertainty in which, by the practice, the extent of the lien is left, seems to require some definite legislative provision. It is believed, that it was the intention of the legislature, to give the mechanics and material men the benefit of a lien upon a building, with

all the appurtenances that confer a value upon it, in the absence of any express stipulation on the subject. But, how are these appurtenances to be ascertained? Certainly, not by any general rule, to be laid down, in the first instance. A dwelling-house, in a city or borough, for example, has, usually, attached to it, a lot of ground, of sufficient depth for the usual out buildings, and, at all events, for the benefit of light and air. A barn in the country, in the middle of a field, would be of little value, if there were no right to approach it. Almost every species of building has some appurtenances, which vary with the different kinds of building. If, then, it can be conceded, that this lien extends to the appurtenances of a building, the difficulty will still remain, of deciding upon the extent thereof. It would be, obviously, wrong, to leave it to the lien creditor, to define the extent of his lien, for himself, on filing his claim. Nor is there, at present, any authority in the court to interfere, before the proceeds of the Sheriff's sale are brought in. They then endeavour to do justice, between the different species of incumbrances, by apportioning the fund among them, according to what they suppose to be the extent of their respective rights. But if, in law, the lien of the mechanic is limited, as it must be, somewhere, or to some extent of ground, the Sheriff, upon an execution, on his claim, can sell no more than to that extent, and the purchaser will, certainly, be in doubt about the extent of his purchase.

"In the bill now submitted, an effort has been made to obviate the difficulties alluded to, which, at least,

as respects some of those mentioned, will, we think, be found successful. It is proposed, in the 3rd section, to provide, that the prothonotary shall keep a docket, in which all the proceedings relating to mechanic's liens shall be contained. The object is, by concentrating all that relates to particular buildings, to facilitate inquiry and notice. In the 4th section, we propose, that the owner of a piece of ground, who may be about to contract for the erection of a building thereon, may, before the commencement thereof, designate the boundaries of the lot, so as to fix the amount which shall be considered as appurtenant to the building. To this, we presume, there can be no objection, as it will take place before any right accrues to the mechanic, and is to be entered, in the book we have mentioned. The 5th, 6th and 7th sections, provide for the case of the owner having failed to make such designation, and authorize the Court, on the application of any person, interested, to appoint commissioners, to examine and report on the proper extent of these appurtenances, and provide for the due execution of their duties, by the commissioners. In the 8th section, power is given to the court, to stay execution upon any judgment or other proceeding, until the extent of the boundaries shall be designated by commissioners, as aforesaid; and the 9th section recognises the power, at present exercised by the courts, of apportioning the proceeds of a sheriff's sale of real estate, according to the extent of the several liens.

"These sections have been framed with a view to the

just rights of the various parties interested, as well judgment creditors and mortgagees, as the builders and owners of the ground, and will be found, we think, to provide, at least, some improvement on the present law, by relieving the public and the parties from the frequent and protracted litigation, to which the prevailing uncertainty respecting the extent of lien, gives rise."[1]

In the Act of 1836, for the first time, there is an express enactment upon the subject. It is as follows: "The lien of such debt shall extend to the ground covered by such building, and to so much other ground, immediately adjacent thereto, and belonging, in like manner, to the owner of such building, as may be necessary for the ordinary and useful purposes of such building, the quantity and boundaries whereof, shall be determined as follows:"

We need not copy, here, the sections which follow, and which appear, at large, in the appendix. A brief abstract will be more acceptable. Each prothonotary is required to keep a "Mechanic's lien docket," for recording all descriptions, and all claims filed, with the dates of filing them, and the names of owners, contractors, and lien claimants, alphabetically indexed. Any person, who is about to build, may define, in writing, "the boundary of the lot or curtilage appurtenant to his building," before commencing its erection; and, when this writing is entered in the docket, all persons shall be bound by the description. If the owner fails

[1] Report of the Commissioners.

to do this, either he, or any one "having a lien on" the lot, "by mortgage, judgment or otherwise, or entitled to a lien by this Act," may, before the commencement of the building, apply to the court, to appoint commissioners, to designate the boundaries. The court, after reasonable notice to all interested, may appoint such commissioners, as they shall nominate, or, if they cannot agree, such as it thinks proper. These commissioners are to report to the court, by metes and bounds, with courses and distances, and a draft, if required, "the limits and extent of ground necessary for the convenient use of such building, for the purposes for which it is designated," and their report, when entered in the docket, and approved, is to be conclusive. If execution issues, before the boundaries are thus ascertained, the court may stay it; and when they are ascertained, may "order the sale to proceed, in such manner, and for such part or parts, and in such parcels, as shall be most convenient, for the administration of equity among all persons interested." If the building, or adjacent ground be sold, by virtue of an execution, "upon any mortgage or judgment," before the extent of the claimant's lien is ascertained, the court shall determine the rights of all concerned, in the usual way.

This mode of defining, by anticipation, the boundaries of the premises to be affected by the lien, is very rarely adopted, as far as we can learn.

We find but two cases bearing upon this subject, since the Act of 1836. One of them arose upon the report of a commissioner to ascertain boundaries, under

the sections just referred to; another, in a proceeding to distribute the proceeds of a sheriff's sale.

In the former, which was in the Common Pleas of Lancaster county, Lewis, J., held, that a claim filed against a church did not include a grave-yard connected with it, in the usual way.[1]

In the latter of these cases, a feigned issue was directed, under the Act providing for the distribution of the proceeds of a sale by the sheriff. The plaintiff, in this issue, was a judgment creditor; the defendant, one who claimed under mechanic's claims; and the question which arose was, what part of the land sold was liable to the claims, and what not.

The levy was on a steam saw mill and ground having a front of ninety feet. The sale was of a steam saw mill and a lot sixty feet front, and also of a lot thirty feet front, sold separately and distinctly. The defendant asked the court to instruct the jury, "that if the owner of the property laid off the ninety feet, as necessary for the mill, and made the contracts with the mechanics and material men, to bestow their labour and materials, the plaintiff was not entitled to recover."

The court charged the jury as follows: "You have heard all the evidence, and have viewed the ground and buildings, and are, no doubt, well prepared to decide the case. Was the half lot necessary for the convenient use of the building, for the purposes for which it was intended? If so, you will find for the

[1] Beam *v.* First Meth. Ep. Church, 5 Pa. L. J. 287.

defendant. If part of it was thus necessary, you will determine what that part is, and the proportion of the price for which this half lot was sold, which should be appropriated to the mechanics' liens. In determining this question, you will consider the manner in which it has been used by the owner of the lots and building, what they said about it, what others have testified in relation to it; and, also, your own observations, made when on the ground, may tend to aid you in the determination of this question." The charge was sustained by the Supreme Court on appeal.[1]

It would appear, from this latter case, to be a question for the jury, how much ground is "necessary for the convenient use" of the building, "for the purpose for which it was designed." But, whatever tribunal is to decide it, it is, by no means, free from embarrassment. In a mere question of boundary, there may be but little difficulty, in a city; more, perhaps, in the county. But the subjects of appurtenances, and of fixtures, or accessions are not clear, and the usual difficulties in dealing with them are complicated with new and peculiar views, arising under the Acts upon which we are now commenting.

The case of Werth *v.* Werth, just referred to, in which a barn was the subject of the lien, and the novel duty was imposed upon the commissioner, of ascertaining how much land was necessary for enjoying it, in the usual way, is an example of the kind of questions that may arise. It is by no means clear, that

[1] Keppel *v.* Jackson, 3 W. & S. 323.

the commissioner would have been wrong, if he had, when the barn was given to him as a principal, found the dwelling house, or even the whole plantation, an incident or accessory, necessary to its proper enjoyment. For a barn in the midst of a plantation, without more, would be almost as valueless as a building without the ground on which it is built. The same remarks may be made in reference to other of the structures usually called out-houses.

The same principles, of course, that govern, in ascertaining what is necessary to the convenient use of a single house, would apply, in deciding between adjoining houses, against which apportioned claims are filed.

In practice, the parties, not only, seldom resort to the mode of ascertaining boundaries pointed out by the Act of 1836, but, very frequently, fail, altogether, to describe, in their claims, the premises which they seek to affect with a lien, by metes and bounds.

Thus, in one case, we find a claim sustained against "a three storied brick house situated on the South side of Walnut street, between Eleventh and Twelfth streets;" in another, against "a lot on the North side of Lombard street, West of Ninth street, adjoining Stephen Smith's lot, on the east;" in another, against premises "in Dillersville, adjoining land of Peter Hentz and the Pennsylvania Railroad." We might mention many others, in which no mention is made of distances, lines of survey, feet or inches, or boundaries.[1]

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[1] See Post.

Indeed, so much latitude is allowed, in this respect, that a jury has often a double task to perform; first, that of deciding whether the locality of the premises is sufficiently indicated; and, secondly, what surface and what appurtenances are included by implication. It is not until the party comes to make sale under a writ of *levari facias*, that an accurate description is given.

This vagueness of description, however, has, perhaps, one advantage. No one doubts, that if the party filing a claim is able to do so with certainty, he had better describe the premises with all the accuracy of a deed or mortgage. But if he should do so, without certainty, he may include too little, and be bound by his claim. We know of no decision which leads us to doubt the law laid down in M'Donald *v.* Lindall, before mentioned, that the lien will not extend beyond the land expressly described in the claim, even where more might have been included.

We shall, in a subsequent chapter, state the mode in which a plaintiff may reach a judicial ascertainment of the extent of his lien, in respect of surface, and the metes and bounds which are proper for his writ of *levari facias;* and, also, the manner in which a defendant may relieve himself from an excessive levy.

CHAPTER III.

OF THE SUBJECT OF THE LIEN WITH REFERENCE TO THE ESTATE.

It will be, at once, apparent, upon a reference to earlier Acts, that, while tenants for years, tenants for life, owners of equities, only, and even trespassers may build, no part of any of their enactments throws light upon the question, what estate is, in each instance, affected by the lien, or passes by a sale under the proceedings to which the mechanics' claim gives rise.

The point, however, soon suggested itself to counsel, and the courts were obliged, by decision, to supply the omissions of the statutes.

We have, heretofore, referred to many of the cases which follow, in considering who may pledge the credit of the building. We now notice them more fully.

In the case of Savoy *v.* Jones, a married woman, *cestui qui trust* for life, under a marriage settlement, which gave her husband a contingent remainder for life, and other interests over, erected a building, during her coverture. One of the material-men filed a lien against her, the husband and the trustee. The wife died, while the proceeding under it was pending, and, upon her death, the point was made, that the estate of the

person who erected the building being ended, the lien was gone. It was held by the court, however, that the lien arose from a credit given to the building, not to the owners; that all the remainder men and reversioners were benefited by the building, and that it was just that the whole estate should be bound.[1]

In the case of Barnes *v.* Wright, the court intimated, that this point could not be considered as definitively settled, and might be reconsidered.[2] In a case, too, in the Circuit Court of the United States, the leaning seems to be against the doctrine announced in Savoy *v.* Jones.[3]

But in the case of Bickel *v.* James, Gibson, Ch. J., speaking of the Act of 1836, says:—"By the primitive Act of 1803, supplied by the Act of 1806, on which, with the supplement of 1808, the present question depends, the legislature hypothecated buildings for debts contracted in the construction of them. No more was contemplated in it, than the usual case of a builder, on his own ground, and, hence, in an action against the legal owner, a lien was not allowed for materials furnished on the order of a vendee, by articles of agreement, because, an action to enforce it could be maintained only on the contract by which the debt was incurred, and of which the lien was an accessory. Steinmetz *v.* Boudinot, 3 Serg. & Rawle, 541. The legislature had provided no means of enforcement but

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[1] 2 R. 350. And see Anshutz *v.* M'Clelland, 5 W. 487.

[2] 2 Wh. 193.

[3] 2 Wash. C. C. R. 33. And see Kline *v.* Lewis, 1 Ash. 32.

an action; and it could, of course, be maintained only against the contractor. Had it been brought against him, in that instance, it would have raised a question like the present, but depending on different provisions; yet it might not have been impossible to maintain, even under the Act of 1803, that an equitable vendee was an owner, within the purview of it. That it would, certainly, have been so adjudged, I pretend not to assert; for the lien having been but an accessory of an inchoate estate, might, readily, have been postponed to the legal title; and I think it probable, that a Mechanic's Lien, like a judgment, would have bound only the equitable estate of the vendee. But the glimpse which the legislature then had of the subject, was barely sufficient for a sketch of its first lines; for it was soon found, in the city of Philadelphia, and those districts of the county to which the primitive Act was confined, that contracts for labour and materials were, usually, made, not by owners, building for themselves, but by architects employed to build and contract on their own credit. Hence, a radical change in the principle of hypothecation, by the Act of 1806. The lien was, no longer, an accessory of the owner's title, but became an independent incumbrance; insomuch, as not to require a title to have been in him at all. Every thing about ownership was suppressed, and the building, itself, became the principal debtor; but still, answerable, only, by an action against the contractor.

"Then came the supplement of 1808, which gave, in addition, a *scire facias*, jointly, against the owner and

the contractor; and strictly, as a proceeding *in rem*. As was recognised in Savoy *v.* Jones, 2 Rawle, 343, the credit, under these two Acts, was, primarily, given to the building, and though the builder, also, was liable on his contract, the action, so far as it was used to enforce the lien, was, also, a proceeding *in rem*. It is entirely omitted in the Act of 1836, which has superseded all antecedent legislation on the subject. But the project of the legislature, in the preceding Acts, has been, as it still is, to secure to the mechanic, or material man, the fruit of his labour or materials, by selling the building, of which it happened to be a component part, without regard to the ground. The latter was a subject of so little consideration, as not to have been mentioned in either of them; and, that it is sold as an appurtenance of the building, is because it could not be severed from it. But, where the building and the ground fetch, as they must generally do, more than the amount of the liens, I see not what difficulty there can be, according to an obvious principle of equitable conversion, in substituting the surplus purchase money, for the realty which produced it, and giving it, respectively, to the owners of the fee, in proportion to their interests in it. By this, there can seldom be a loss, and never an injustice; for the question is, whether the building shall follow the ownership of the ground, or the ground follow the ownership of the building, If decided for the claimant, the owner will, in *most* cases, be paid for his ground; but if for the owner, he will, in all cases, get the benefit of another's uncompensated labour or ma-

terials, in addition to it. Were the building sold without the ground, the interests in the freehold would not be disturbed; but, as that is impracticable, a consequent loss may, sometimes, have to be shared by claimants, under the same title, of separate interests in the fee."[1]

In this case it was held, that a vendee of land under articles of agreement, who had not yet acquired a legal title, but who entered and built, subjected the fee simple of the land to his lien, and that a sale under it vested a complete and absolute title in the purchaser.

The same doctrine was announced, with equal positiveness, by Kennedy, J., in a subsequent case.[2]

In the case of O'Conner *v.* Warner, which was decided after the Act of 1840, to which we are about to refer, Gibson, Ch. J., says, upon this subject: "It would puzzle those who controvert the principle of Savoy *v.* Jones, and the subsequent cases of that stamp, to give a reason for the faith that is in them, beyond the apparent hardship of the case. The debt secured by the Act of 1806, was the debt of the building, not of any owner of it; the lien was on the building; the process was against the building; and the building itself, not the builder's interest in it, was directed to be sold. The debt was charged on it, as taxes are charged on unseated land, without regard to the ownership; and, we are bound to say, the building was sold like unseated land, without regard to the ownership. To do otherwise, would have re-

[1] 7 W. 9.

[2] Holdship *v.* Abercombie, 9 W. 53.

quired us to interpolate the very provision which has been recently, but incautiously, interpolated by the legislature, and thus, perform an act of judicial legislation, not less abhorrent to the principles of the constitution, than an Act of legislative adjudication. We could not say, that the estate in expectancy was excluded from the lien by the spirit of the Act, or that it would have been protected, had the case been foreseen. The avowed object was, to protect the mechanic or material man, without regard to any one else; and, that the reversioner or remainder-man was intended to be put on a footing with the tenant in possession, is evident from the clause which authorized "any person interested in the building" to call for a formal entry of satisfaction; for it would have been absurd to give him a right to expunge the evidence of the lien, if he might not be affected by it. And this liability of separate interests, to contribution towards a general burden, though sometimes attended with hardship, in practice, was just in its principle, inasmuch as it was calculated to produce the results which equity produces, when it apportions a general charge among owners of the separate parts of a fee, in proportion to their relative value and the benefit received by each from the consideration of the incumbrance. Besides this, the injustice of allowing the claimant to follow his materials, or the products of his labour, into the hands of a reversioner or a remainder man was no greater, than the injustice of allowing him to follow them into the hands of the tenant in possession, who was as much a stranger to the

debt, and who did no more than authorize the erection, but without authorizing the contractor to charge the building with the price of it. The law did that; and it was just as unconscionable to affect the ownership of the particular tenant by it, as it was to affect the ownership of his successor, who derived equal or greater benefit from the erection. It was, for the very reason, that the operation had to do with the contractor, and not with the owner, that he was allowed to charge the building, without regard to the ownership of it, of which he could know nothing. The fallacy is, in imagining, that he stands more in privity with the tenant in possession, than with those that are to come after him. He has no connexion with any of them; and, therefore, it is, that the statute allows him to charge the building, without discrimination, in regard to their particular interests. Nor is such a statute a novelty in the history of legislation. The 21 Jac. 1, c. 19, subjects a bankrupt's entailed estate to payment of his debts, and makes the conveyance of the commissioners good against the issue in tail, to say nothing of those statutes which enable tenants in tail to make leases for three lives, or to forfeit the estate for treason, or to incumber it with debts to the crown. Our own statute for barring entails, by the acknowledgment of an assurance, in open court, enables him, not only, to disinherit the issue in tail, but, also, to divest the estate of the fee simple remainder man. Why, then, should it be thought a thing incredible, that the legislature intended to charge more than the interest of him who caused the building to be erect-

ed? Our legislation, for almost forty years breathed one uniform spirit of kindness to the operative, and it was not without our special wonder, that we saw it, in 1840, breathe a hostile one. The manifestation of its former kindness is visible in the enlargement of the system, so as to embrace ships, and even curb-stones, and in the gradual diffusion of it over almost the whole state, without changing, or so much as touching the controverted interpretation. The experienced counsel who prepared the revised Act of 1836, with Savoy *v.* Jones before their eyes, saw nothing in it which called for correction. It is supposed, however, that the dayspring of 1840 revealed its moral deformity, and taught the legislature to shift the burden of its injustice from the shoulders of the innocent reversioner or remainder man, to those of the more innocent purchaser, who had paid his money on the faith of laws constitutionally enacted and expounded. No man can assent to a proposition so monstrous; yet it might be inferred from the literal import of the words, that such was the design; and it shows the dangerous tendency of legislation so hurried as to produce statutes which are a surprise on those who have enacted them. The section of 1840, even in its prospective operation, goes far to sap the foundation of the mechanic's protection; and we cannot think the legislature was apprized of the drift of the section, when it struck the blow at interests so long and so anxiously cherished. When the mechanic can sell no more than a lease burdened with a rent, to the extent of its value, his lien will be worthless;

and, when a grantor of ground let on a perpetual lease, for the very purpose of being built on, enters, for non-payment of the ground rent, he will, necessarily, hold paramount to mechanic's liens. Or, where the person in possession has but an equitable title, those liens will be postponed to the vendor's claim for the purchase money. There must be many such cases."[1]

The case of M'Clelland *v.* Heron, which, also, was decided after the Act of 1840, but upon facts arising before its passage, led some to doubt, whether the doctrine of Savoy *v.* Jones had been firmly established. But a careful examination will show, that it ought to have had no such effect. It was the case of a levy, under proceedings upon a mechanic's lien, upon "all the right, title, interest, and claim of the defendant, of, in and to a certain brick tan-house." The defendant was but a tenant for years, and the court held that only the term passed.[2]

The nature of the levy was enough to distinguish this case from others to which we have referred. But Burnside, J., who delivered the opinion of the court, uses language which seems to cast some doubt on them.

In a later decision, however, Gibson, Ch. J., says: "Let us not produce a conflict of decisions, for a doubtful interpretation. The judgment in M'Clelland *v.* Herron, 4 B. 67, did not produce it, for no more was ruled, than, that a levy and sale of the term did not pass the fee."[3]

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[1] 4 W. & S. 223. [2] 4 B. 63. [3] Haworth *v.* Wallace, 2 H. 121.

We ought to mention, here, however, before we refer to the Act of 1840, and its effect, that there were exceptions to the application of the doctrine of Savoy *v.* Jones.

In the case of Bruner *v.* Sheik, an insurance company, in discharge of its liability under a policy of insurance, rebuilt a dwelling upon land of the insured. The mechanics and material men were held to have no liens.

Gibson, Ch. J., says: In Siner *v.* Moore, it was determined, at the last term in Philadelphia, that the possession of the person whose title is to be incumbered, must be an actual, not a constructive one; but, here, the company, at whose instance the lumber was furnished, had neither possession nor colour of title. It had no more than an incidental right to enter, in order to rebuild, without, in the least degree, displacing the possession of the insured. Nor were the articles furnished for their benefit, but for the benefit of the company, which was bound by its election to rebuild." [1]

It is proper to add here, that the material man, in this case, appears to have had notice of the relations of the parties.

It would, of course, follow, that a mere trespasser upon land could not bind the adverse title by building. This had not been expressly held, but, prior to the Act of 1840, Gibson, Ch. J., says: "It may be, however, that an adverse title would not be affected. A trespasser in possession is not allowed to charge

[1] 9 W. & S. 119.

the owner for adverse improvements; and it may not have been the design of the legislature to give a greater power to agents in his employment, who are also trespassers." [1]

We now come to a new period in the history of this subject. By an Act of 1840 it was enacted that the lien should, "not be construed to extend to any other or greater estate in the ground on which any building may be erected than that of the person or persons in possession at the time of commencing the said building, and at whose instance the same is erected," nor should "any other or greater estate than that above described be sold by virtue of any execution authorized or directed in the said Act."

This Act is said, by Gibson, Ch. J., in one of his decisions, to have been "produced" by the case of Bickel *v.* James.[2]

In cases which arose under this Act, it was held, that it affected liens filed, as well, before, as after its passage, and was not unconstitutional, by reason of this retroactive effect, because it only modified a remedy.[3]

Under it, of course, the earlier cases are inapplicable. They only govern titles which were created under the law before its passage. By its provisions no one who builds can bind a greater estate than he has himself. And the knowledge, simply, or even the assent of the owner of the fee, cannot, as it would appear from the

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[1] Bickel *v.* James, 7 W. 12. [2] Church *v.* Griffith, 9 B. 119.
[3] Evans *v.* Montgomery, 4 W. & S. 218. O'Conner *v.* Warner, id. 223. And see *ante*, p. 41.

words of the Act, subject his estate to the lien. The erection must be, at his "instance," to produce that result, and he must be the person in possession, at the time of commencing the building.

We must not omit, in this connexion, a case which arose after the Act of 1840, in which it was held, that, where the person at whose instance the building was erected had but an equitable title, at the time the work was done and the lien attached, but, afterwards, acquired the legal estate, the latter, at once, became bound; the rule in such a case being the same with that which prevails with reference to judgments.[1]

And, bearing upon the same point, is the decision in Gaule *v.* Bilyeau, already quoted, in which the person against whom the claim was filed, had leased the premises for seven years, with the express provision of purchasing a part of it, upon a designated ground rent, at any time within three years, had erected the building, and, very soon afterward, availed himself of his privilege of purchasing, and received a deed for the property. Lewis, Ch. J., held, that the tenant, having a right to acquire the fee when he built, must be treated as having an equitable estate in the land, which was the subject of a claim.[2]

We ought, also, to observe, that it was subsequently to the Act of 1840, that the decisions were made, to which we have before referred, in respect to erections by tenants of leasehold estates, and their character as personalty. It is most distinctly intimated, in

[1] Lyons *v.* M'Gaffey, 4 B. 126.

[2] See *ante*, p. 93.

these decisions, that prior to the Act of 1840, a building by a termor, even for the purpose of his trade, would have affected the fee simple; that an "erection or construction by any one who had an estate in the land, as distinguished from a mere trespasser, bound the whole estate; though, as between the parties interested, the present estate might have been a chattel interest, only, and the building personalty: but that after the passage of that Act, the lien was left to stand upon the estate of the person in possession, and building, alone, and, when that was a mere chattel interest, the building partook of the same character, and was not subject to proceedings under the Acts which we are considering, which apply only to real interest.

PART IV.

OF THE NATURE, AND EFFECT, AND OF THE DISCHARGE OF THE LIEN.

CHAPTER I.

GENERAL REMARKS ON THE LIEN.

THE mechanics' lien is one of a peculiar character. It differs, in some respects, from any other lien known to the law. Those which most resemble it are municipal liens, for public dues.

It may begin without any writing, entry or record, whatever; and, when it attaches, it has relation back, at once, to a period, often doubtful and undefined, and the ascertainment of which depends upon evidence *in pays*. It lasts, without any further form or notice, for a certain period, and may, then, be further continued, by filing a claim and keeping it alive by process.

The extent of the lien, as to amount, has no limit but the honesty and moderation of the creditor, who, in many instances, claims more than he hopes to recover, so as to be sure to comprehend what he can actually prove. Double, treble, quadruple claims may be filed, for the same debt. Indeed, often, if one

were to form his opinion of cost from the alleged claims of mechanics and material men, and add to their aggregate what he knew had already been paid, in cash, to the contractor, he would have a most exaggerated idea of the expense of construction.

A purchaser or mortgagee must see the premises, and, if he finds a house newly erected, or in course of construction, he must refuse to purchase or to lend his money, until, in some mode or other, he can assure himself that it is free from this species of incumbrance; and, even then, he will be in danger, until a certain interval has elapsed, after the completion of the building. For work done, or materials furnished, subsequently to his purchase or loan, will have a priority by reason of their relation back to the commencement.

And, after the house is completed, and the interval spoken of has elapsed; when the time has come for the creditor to put his claim on record, or lose it, such license is allowed in the form of the claim, in the description of the premises, their locality and extent, that an office search is only the beginning of inquiry.

These remarks will give a faint idea of the trouble and danger which arise from this class of liens.

The claim which continues the lien, and affords a basis for the proceedings which lead to the recovery of the amount due, is purely a proceeding *in rem*. So entirely is it a remedy against the land alone, that if, pending its progress, the premises are sold, the claimant cannot proceed even for costs.[1]

[1] See Post.

The most important aspects of the nature and character of this lien are with reference to its commencement, its continuance, its relation to other liens, and its release, satisfaction or extinguishment. In this order we shall pursue the subject.

CHAPTER II.

OF THE COMMENCEMENT OF THE LIEN.

The Act of 1803 made the debt a lien, "before any other lien which originated subsequent to the commencement of the said house or other building." The words of the Act of 1806 are the same. Those of the Act of 1836 run thus: "The lien for work and materials, as aforesaid, shall be preferred to every other lien or incumbrance which attached upon such building and ground, or either of them, subsequently to the commencement of such building."

The commencement of the building is, of course, the first work done upon the ground; the striking of the spade into the earth, in digging the foundation, or if there be no such foundation, the laying of the first stone or timber. No case decides, that work done off of the ground can make a commencement. These seem to be very clear propositions; but the cases show that they do not always relieve us from difficulty.

A change of ownership during the progress of the building does not, it appears, make a new commencement.

In the case of the American Fire Insurance Co. *v.* Pringle, an unfinished house was sold, and a mortgage given by the vendee to secure the purchase money. The vendee then went on with the building. It was

held, that, as to the mechanics and material men employed by the vendee, after his purchase, the "commencement" of the building was the original commencement, by the vendor, and that their liens cut out the mortgage. To this opinion, Yeates, Justice, dissented.[1]

A similar decision was made, however, in the case of Hern *v.* Hopkins.[2]

In Pennock *v.* Hoover, which was a case substantially resembling the former, the court says: "By the terms of the Act of Assembly, before, in part, recited, the liens thereby given to mechanics and material men, are made to commence, expressly, from the commencement of the building of the houses, without reference or regard to the persons under whose directions or ownership of the property they are begun, continuing to be the same, at whose instance the materials, from time to time, shall be furnished, and the labour performed, throughout the subsequent stages of the work, until finished. It is not the commencement of the right of ownership, or claim to the property; nor yet the time at which such right may be first exercised, in contracting for materials, and with mechanics, for the purpose of continuing the building, that is to fix and regulate the commencement of the liens, on behalf of those furnishing materials, and performing the work; nor is it the time of furnishing materials, or the time of commencing or finishing the work, but the time of commencing the building of the

[1] 2 S. & R. 138.

[2] 13 S. & R. 269.

house, that gives date to the lien. Now, in point of fact, as long as the design or use for which the house is intended, shall continue to be the same, a change of ownership, after the building of it is commenced, does not, and, in the very nature of the thing, itself, cannot change the commencement of the building of the house; that must, still, continue to be the same, notwithstanding the right of property in the ground, and the house begun upon it, shall have been changed subsequently, and passed through twenty or more different hands. Neither is it easy to conceive, how a change made in the plan of the house, after it has been commenced, by enlarging or contracting, or, in any other respect, changing the plan of it, as long as the original design of its character is retained, can, with propriety, be said, to change or give a new commencement to the building of it. And the Act of Assembly of 1806, certainly, contains nothing, which, in the slightest degree, militates against what, I think, may be, safely, considered the universal understanding, as to what constitutes the commencement of the building of a house; and that is, the first labour done on the ground which is made the foundation of the building, and to form part of the work, suitable and necessary for its construction."[1]

In several of these cases, however, it is intimated that a change of circumstances would alter the law. Thus in the American Fire Insurance Co. *v.* Pringle, the court say:—"Houses are sometimes finished, suf-

[1] 5 R. 307.

ficiently for particular purposes, such as ware-houses or stores, but not for dwelling-houses; and they may remain in this situation for years, and then be completely finished. In such cases, the *completion* of the work might fairly be considered as a *new building*, and ought not to be connected with the first part of the building so as to give a lien from the original commencement." And, in Hern *v.* Hopkins, the same judge says:—"Suppose, for instance, a ware-house should be, originally, built and finished, and after remaining for some time, in this situation, it should be converted into a dwelling-house,—there the new work might be considered as a new building."[1]

And, where, instead of a private sale of the premises, there has been a sheriff's sale, which discharged all previous liens, the work done and materials furnished thereafter, must have reference to a new commencement, subsequent to the sale. Thus, in Stevenson *v.* Stonehill, the court say:—"Admit that the lien commences with the first work, the sheriff's sale extinguishes that lien, totally. If any lien in favour of material men or mechanics is found to exist, after the sale, it must commence after the sale, for, so far as it existed before the sale, it has totally ceased."[2]

The result of these cases appears to be, that when, between two periods of continuous and substantial work upon a building, there is an interval, it does not, ordinarily, so separate them, in law, as to lead to the doctrine of two distinct "erections" and two distinct

[1] Ante. [2] 5 Wh. 305. See, also, Leib *v.* Bean, 1 Ash. 208.

commencements; but the two periods are treated precisely as if no interval had occurred; but, that this ordinary rule or *prima facies* may be rebutted by a very great lapse of time; or by an entire change, during the interval, of the whole plan and object of the house; that a change of title, during the progress of the building, by private sale, will not affect mechanics, with reference to whom the building is treated as if no change had occurred; but, that a sheriff's sale will make a new commencement, to which any work done after it will have relation.

Where, however, the work done, after the interval of cessation, is not of a substantial character, important in quantity and amount, but slight and trivial; in such a case, the question of a double erection or commencement could scarcely be raised, under any circumstances. The last work of the interval was very great, would be considered extra, additional work, on the same footing with alterations and repairs not done, technically "for or about the erection or construction" of the building, and not the subject of the lien.

But this subject we present more fully in the succeeding chapter, in treating of the continuance of the lien.

We may remark, here, in passing, that, in the case of several adjoining buildings, and an apportionment, each apportioned part of the debt may relate back to a different date for the commencement of its lien, unless a block of houses is such a unity that the commencement of any one is the commencement of all.

And this view of the unity of the block, though it receives some countenance in a decision of Gibson, Ch. J.,[1] is yet, apparently, in conflict with this language of the court in Pennock *v.* Hoover,—"Hence it would extend itself to all the houses or buildings actually commenced, for which the materials were furnished or work done under the same contract, and would become a joint lien for the whole amount of the debt, commencing on each house with the commencing of the building thereof."[2]

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[1] Chambers *v.* Yarnall, 3 H. 265.

[2] 5 R. 313.

CHAPTER III.

OF THE CONTINUANCE OF THE LIEN.

By the Acts of 1803 and 1806, the lien of the mechanic and material man continued for two years *from the commencement of the building*, without any claim filed, or any proceeding, whatever. It then ceased. No further legislation altered this rule, until the Act of 1836.

By that Act it was provided, that the lien should continue "until the expiration of six months *after the work shall have been finished or materials furnished*, although no claim shall have been filed therefor; but such lien shall not continue longer than the said period of six months, unless a claim be filed, as aforesaid, at or before the expiration of the same period." This is the provision which is now in force.

It becomes an important matter for inquiry, under the Act of 1836, by what rules the period from which the six months is to be calculated, is to be ascertained, in each of the numerous and varying cases that may occur.

We may say, upon this subject, in the outset, that it has been held, in several cases, to be a question for the jury, when the work was finished and the materials furnished.[1] But, in its directions to the jury, the

[1] Driesbach *v.* Keller, 2 B. 79. Holden *v.* Winslow, 6 H. 160.

court must be governed by certain principles; for there are aspects of the question which are undoubtedly matters of law.

It was settled, by late cases, that, when materials were furnished for a building, or work done, at several distinct periods, upon distinct orders, not under one continuing contract, each period gave rise to a distinct debt, which stood by itself, with reference to the question of time which we are discussing. The first of these cases was somewhat of a surprise to the profession, and established a rule in conflict, at least, with the usages of mechanics, and the impressions of many members of the profession.

In that case, materials had been furnished to a dwelling from time to time, as they were ordered, and within six months from the time of furnishing the last a claim was filed. The court held, that every item of the bill not furnished within six months had lost its lien, and say: "but a contractor who goes to a lumber merchant, and obtains lumber, as he needs it, for the job on hand, makes a new contract at each purchase, and the statute bars all of the account more than six months old at the filing of the lien."[1]

The same doctrine was again announced, by the Supreme Court, in a subsequent case. In delivering the opinion of the court, Lewis, Ch. J., says: "More than eleven years ago, it was decided, in the Common Pleas of a neighbouring county, that, where materials are delivered, at different times, and there is no evi-

[1] Phillips *v.* Duncan, 12 Leg. Int. 5.

dence, that they were furnished under an entire contract, all the items delivered more than six months prior to the filing of the lien are barred by the statute limiting secret mechanic's liens, (Gilbert Hill's Estate, 3 Penna. Law Jour., 323.) A practice has prevailed, in the interior, in accordance with this opinion, and that practice has, recently, received the sanction of this court, in an opinion delivered by Mr. Justice Woodward, in Duncan *v.* Phillips. It is well settled, in the construction of another statute of limitations, that, where the items in an account are all on one side, and there is no evidence that they were furnished under an entire contract, the items over six years old are barred. 2 W. & S., 137. The difference between the two statutes of limitations is, that, in the first, six *months* is the period which bars, and, in the other, six *years*. This, certainly, makes no difference in the principle, and does not authorize a different rule of construction. But there is another difference. The first mentioned statute is designed to protect creditors from being injured by secret liens not placed on record. The other operates in favour of the debtor himself, who, of course, knows all about the extent of his indebtedness, and, in honesty, is bound to pay it. If this difference between the two statutes should authorize a different rule of construction, it should still be more rigid against secret liens, injuriously affecting those creditors who have given credit, in ignorance of their existence. The filing of a lien is done with so little trouble or expense, and its propriety is so obvious, in order that others may be

guarded from injury, that a creditor, who neglects it, has no reason to complain, if he fails to gain a priority over others who have complied with the law. The case of Johns *v.* Bolton, 2 Jones 339, was decided on the effect of a retrospective statute, and does not touch the principle involved in this case. The lien, in that case, was created by an act passed two years after the work was done, and the claim filed.[1]

To meet these decisions, the Act of April 14th, 1855, was passed, by which it is enacted, that, "whenever the items of a mechanic's and material man's bill for work done, or materials furnished, continuously, towards the erection of any new building, are, in any part, *bona fide*, within six months before the filing of the claim therefor, the lien shall be valid for the whole; and any lien heretofore filed, within six months after furnishing the last item of a continuous bill, shall be good and valid, the same as if the whole bill were furnished within six months."

The use of the words "continuously," and "continuous," in this Act, will lead to questions hereafter. Perhaps some aid in construing the provision may be gained from cases to which we shall hereafter refer, in this chapter.

The decision, last referred to, expressly excludes from their application the cases in which the work is done, or the materials are furnished under a continuing contract. Thus, in Phillips *v.* Duncan, the Court say: "Where materials are furnished under a special

[1] O'Neil *v.* Flanigan, 12 Leg. Int. 6.

contract, as for the brick or lumber of a particular house, the lien may be entered within six months after the delivery of the last item, for that is the completion of the contract." And the same doctrine had, frequently, been announced, in prior cases.[1]

It is manifest, that, notwithstanding the Act of 1855, a case may occur, where one delivery of materials, or portion of the work, is so far separated and distinct from one another, that the most liberal construction of the word "continuously" will not be satisfied. The question that arises here resembles, somewhat, that which arose, in the preceding chapter, in treating of the cases in which there were two commencements of the building, or, where the last work, not being of sufficient dignity or importance to be called a new commencement, was held to be mere addition or repair, and not within the Acts.

In an early case, a question arose, whether materials furnished for a vault were the subject of a claim. The court below, in its charge to the jury, said: "The vault, it appears, was a part of the original plan of the building, and, if so, a part of the building; not an addition after the house was completed." In this case, no question of time seems to have been involved, but only that suggested in the extract which we have given.[2]

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[1] Bartlett *v.* Kingan, 7 H. 341. Yearsley *v.* Flanigan, 10 H. 489. Shaffer *v.* Hull, 3 Pa. L. J. 321. Dalton, Christman & Co's. Ap. 12 Leg. Int. 180.

[2] Harker *v* Conrad, 12 S. & R. 303. See, also, Presb. Ch. *v.* Allison, 10 B. 413.

In Johns *v.* Bolton, it seems to have been held by the court below, and the judgment affirmed by the Supreme Court, that, where the work had been completed, so far as the contract required, more than six months before the claim was filed, but, within the six months, extra work was done, at the request of the defendants, the six months began to run from the completion of the extra work.[1] It is proper, however, to remark, that this case, which was, at any rate, entitled to but little weight, was overruled, clearly, by that of Phillips *v.* Duncan.[2]

In Holden *v.* Winslow, a question arose, as to the time of finishing a mill. The lien was that of the contractor. The work was commenced in the spring of 1847, and continued for more than a year, when the contractor left the work, as he alleged, for want of materials, which the defendant was to furnish; and though he returned once or twice, prior to November, 1849, he did not complete the mill. In October, 1849, the defendant sold the mill, and, in November, the contractor commenced his work, and finished it in December, 1849. There was testimony, that the mill was not considered finished in 1848. The court say:— "The question is, whether the topping out done by the mechanic was part of the original agreement, and was the crowning work of his job, or not, and, whether it was done in due time, without unreasonable delay, by consent of Winslow; or, whether it was a distinct contract, entered into after his first work was finished."[3]

But, in Yearsley *v.* Flanigan, a different view was

[1] 2 J. 339. [2] *Ante*, p. 173. [3] 6 H. 160.

taken of the subject. The court say:—"Where a contract is made with a bricklayer, to do all the brick and stone work, about the erection of a building, which contract, by its terms, includes the laying of the pavement, as it is an entirety, a mechanics' lien may be filed within six months from the completion of the work, even though it may all have been done, except the pavement, more than six months before the lien was filed. The work upon the pavement may be included in the lien.

"If laying the pavement is done under a separate contract from that of constructing the walls and other masonry, and six months is suffered to elapse from the last work upon the building proper, before the lien is filed, it is, then, too late, as it cannot be connected with the work in laying the pavement.

"Even where the contract is entire, if the building is finished, and the contract treated as complete, by the parties, and a considerable period of time is suffered to pass, before the pavement is laid, and intervening rights have attached, the lien would not be in time, if not filed within six months from the date of the last work upon the building, itself, excluding the pavement."[1]

These are all the cases of which we are aware, bearing upon this difficult subject; and we must leave it to the developments of future decisions.

The lien continues for the six months referred to in the Act without any claim filed. Even the filing of

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[1] 10 H. 491.

a defective claim, or several of them, does not disturb it. It is not destroyed during the period over which it extends, without any process, by an abortive effort to give it permanence.[1]

We shall mention, in this connexion, a case in which it was held, that, where materials were furnished on the 22nd day of January, the claim had expired before the 23rd day of July; and that a claim then filed, to continue the lien, was too late.[2]

The next step, in the progress of the subject, is the continuance of this lien, after the period to which it continues, without process, by filing a claim. The claim must, of course, be filed before the lien of the debt expires, under the doctrines just announced.

By the Act of 1803, the debt could not remain a lien longer than two years from the commencement of the building, unless an action were instituted, for recovery thereof, or the claim filed, within six months after performing the work or furnishing the materials. The Act of 1806 was to the same effect.

It was held, under these Acts, in the case of Lewis *v.* Morgan, that, upon a claim filed after the six months, the party could not obtain a judgment, by suing out a *scire facias*, even though it were sued out within the two years.[3] The same doctrine was held in the subsequent case of Hern *v.* Hopkins, in which the

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[1] Bournonville *v.* Goodall, 10 B. 133. Chambers *v.* Yarnall, 3 H. 267. Pennock *v.* Hoover, 5 R. 318. Hays *v.* Tryon, 2 M. 208.

[2] Hoops *v.* Parsons, 2 M. 241.

[3] 11 S. & R. 234.

court say, that "the claim, not being filed within six months, acquired no validity from the act of filing."[1]

The same doctrine was laid down, in regard to the institution of an action, instead of filing the claim. If done after the six months, it had no efficacy to continue the lien.[2] And in Williams *v.* Tearney, where the creditor had obtained a bond, with warrant of attorney, and had entered it for judgment, within the two years, he was held not to have continued his lien, thereby, beyond the two years.[3]

By the Act of 1836, the lien, as we have seen, does not continue longer than six months, unless a claim be filed before the expiration of that period. No provision is made for its continuance in any other manner.

The Commissioners, upon this subject, say: "In this section, the provision of the first section of the Act of 1806 is, materially, altered. The original has given rise to great doubt and litigation; besides which, it is believed to operate injuriously upon the owners of property and incumbrances, by the uncertainty in which it keeps them, for an unnecessarily long period. 'The commencement of the building,' from which the two years begin to run, does not afford that general rule which is desirable; some few buildings requiring more than two years to finish, while others are completed in much less time. Besides, it is, in most instances, very difficult for third persons to ascertain, when the particular work was performed, or materials fur-

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[1] 13 S. & R. 269.

[2] Cornelius *v.* Uhler, 2 Br. 220.

[3] 8 S. & R. 58.

nished, from which the six months run; consequently, the risk of purchasers of real estate is greatly augmented. The limitation in the section now suggested, seems more simple and less likely to embarrass.

As long as the building is in progress, sufficient notice is given, and the period of six months after it is finished seems to give ample opportunity for the filing of the lien."

The next question that arises, is with reference to the duration of the lien when continued by claim or process.

Under the Acts of 1803 and 1806, a claimant, by instituting suit, or filing a claim, within the six months, obtained a lien of indefinite duration.[1] Of the form and character of these proceedings, under the earlier Acts, we shall treat, hereafter, when we come to the subject of practice.

By the Act of March 30th, 1831, the lien was confined to the period of five years from the time of filing the claim. This Act was held not to be retrospective in its operation, so as to affect the lien of a claim filed prior to its passage.[2]

The Act of 1836, also, confined the lien of a claim to the period of five years from the day of filing it; but allowed it to be revived by scire facias in the manner provided by law in the case of judgments, after which the lien was to continue, in like manner, for another period of five years, and so, from one such period to another.

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[1] Knorr *v.* Elliott, 5 S. & R. 49. [2] Mustin *v.* Vanhook, 3 Wh. 574.

It was held, in the case of Sweeney *v.* M'Gittigan, that where more than five years had elapsed, between the time of filing the claim, and the obtaining of a verdict on a *scire facias* therein, the lien was not lost. This decision was in analogy to those in reference to judgments.[1]

It has been held, that, where real estate is sold by the sheriff, the lien of a judgment, which had not expired at the time of the sale, attached to the proceeds, and continues, without further revival, until it is paid.

In Burt *v.* Kurtz, a claim was filed, after a sheriff's sale. The court say, in respect to it, "A claim to perpetuate the lien of a mechanic or material man, if within time, in other respects, may, undoubtedly, be well filed, after a judicial sale of the premises. Where the purchase money is substituted for the land there is no reason why the lien should not attach itself to it, as it would to the land in the hands of the purchaser were it liable to the charge." [2]

And, in a case which we find mentioned, as decided in the Common Pleas of Franklin county, in 1819, it appears to have been held, under the earlier Acts, that a lien which had not expired, at the time of the Sheriff's sale, might expire, for want of a claim, after the sale, as against the proceeds.[3]

These decisions seem to make a difference between the lien of a judgment and a mechanic, in this respect. But in a much later opinion the court seems to take

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[1] 8 H. 320. [2] 5 R. 248.

[3] Sharpknack *v.* Wilson, Wh. Dig. 5 Ed. pl. 127.

a different view. In that case, it says: "The same principles apply where the property is sold by the Sheriff before the expiration of the time allowed for the lien to be filed. The claim may, then, be made upon the fund produced by the sale in like manner as though the lien had been entered of record."[1]

This doctrine seems to harmonize better with that of the cases to which we shall hereafter refer, which seem to make all proceedings after a sale of the premises a nullity, and refuse to allow a claimant to proceed even for costs.

By the 24th section of the Act of 1836, it is provided that the claim may be "revived by *scire facias*, in the manner provided by law in the case of judgments, in which case, such lien shall continue, in like manner, for another period of five years, and so, from one period to another, unless such lien be satisfied, or the same be extinguished by a sheriff's sale, or otherwise, according to law."

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[1] Yearsley *v.* Flanigan, 10 H. 491.

CHAPTER IV.

OF THE POSITION AND PRIORITY OF THE LIEN.

The mechanic's lien is, of course, prior to all liens originating after the commencement of the building. But liens which have attached before the commencement of the building take precedence of them.[1]

In a case of Lyons *v.* M'Gaffy a mechanic's claim was held to have precedence over a judgment for purchase money, which was not entered up till ten days after the deed was delivered. In this case, the work was done while the owner had a merely equitable title, and the lien attached to the equity. When the legal estate was acquired, the lien bound it, also. What would have been the case, if the purchase-money had been secured by a mortgage, or by a judgment entered up at once, is not stated. The decision appears to have been based upon the fact, that when the equity had merged in the legal estate, the mechanic's lien was the first to take effect.[2]

No part of the record of a claim, though it be pursued to judgment, specifies the time of the commence-

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[1] Leib *v.* Bean, 1 Ash. 207. Lysle *v.* Ducomb, 5 Bin. 585. Mitchell *v.* Evans, 2 Br. 329. Vanderveer's Case, 2 Br. 304.

[2] 4 B. 126.

ment of the building. This is, always, a subject of proof, when the distribution of proceeds is made. And it renders the intervention of an auditor necessary, in most cases.

It follows, of course, from the fact that all liens upon a building have relation back to the same time, that, if the fund is insufficient to pay them, in full, they are paid *pro rata*. No one claim has preference over another. One who aids in the finishing work is secured equally, and, in the same manner, with one who builds the foundation.

It will be remembered, that, by the 13th section of the Act of 1836, requiring, in all cases where a claim for materials is filed against two or more buildings, owned by the same person, a designation of the amount due from each building, it is provided, that, if he fail to do so, "such claim shall be postponed to other lien creditors."

In the case of Thomas *v.* James, it was held, that this postponement was not only to other mechanic's liens, but to all subsequent liens, whatever.[1]

There is, perhaps, a question, whether a judgment upon a *scire facias* upon a claim deficient in this respect, does not cure the defect. This point has been suggested, in one of the cases, but the court declined to decide it, merely saying, "Whether this provision will reach behind a judgment recovered, to postpone the lien on which it is founded, it is not now necessary to decide."[2]

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[1] 7 W. & S. 382.

[2] Lauman's Ap. 8 B. 477.

It was held, in Lauck's Appeal, that the provisions of the Act which exempts property to the value of three hundred dollars, from execution, are not intended to affect the liens of mechanics and material men. Lewis, Ch. J., in delivering the opinion of the court, says: "The three hundred dollars' worth of property exempt, under the law of 9th of April, 1849, is expressed to be, 'in lieu of the property then exempt, by law, from levy and sale, on execution, on any judgment obtained upon a contract and distress for rent.' This language, evidently, applies only to judgments or distresses for rent, on which property was exempt from levy, as the law stood before the Act of 1849; but no exemption existed, at that time, against a mechanic's lien, as it is confined in its execution to the property for the erection of which the materials were furnished or the work was done. The Act of 1849 applies to judgments obtained on contract. By this is, undoubtedly, meant judgments on contract of the person against whom they may be executed;—that is, judgments against the persons of the parties, which may be levied on the goods or lands of the debtor, generally; and not judgments *de terris*, against specific real estate, which may be executed against such estate, without any contract, whatever, between the plaintiff and the owner. It is our opinion, from the language of the Act of 1849, as well as from the favour which the law extends to mechanic's liens, that it was not the intention of that Act to enable debtors to hold possession of buildings, or to take the proceeds of them, without paying the mechanics and material men for

the materials furnished and work done in erecting them."[1]

It was decided, in an early case, that the liens of mechanics, like judgments, were discharged, by a sheriff's sale. Nor are they saved from this result by the Act of 1830. A sheriff's vendee takes discharged of them, and they are payable out of the proceeds.[2]

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[1] 12 H. 428.

[2] Werth *v.* Werth, 2 R. 151.

CHAPTER V.

OF THE DISCHARGE OF THE LIEN.

A PAYMENT of the debt to the mechanic or material man will, of course, satisfy the lien. But a payment by the owner to the contractor will have no such effect upon the claims of those employed by the latter.[1]

A release given by the mechanic or material man to the owner or contractor, of course, extinguishes the lien, if it be duly delivered.

But, where a release of the owner and the building was delivered to the contractor, by a mechanic employed by the latter, but was never delivered to the owner, because he had failed to pay the proper consideration for it, it was held not to avail him.[2]

We have, already, referred to the cases which show, that the lien will exist, notwithstanding a special agreement with the owner, or the taking of other security or evidence of the debt, before the lien attaches. The question now to be considered is the effect of such acts, subsequently to the commencement of the lien.

Taking another security or evidence of indebtedness is, in general, no satisfaction of the lien. It is merely cumulative.

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[1] Wetherill *v.* Harbert, 2 B. 348. [2] See id.

Thus accepting a note for the amount of the claim, is not a satisfaction of it.[1]

Of course, we must except from this general rule, the case in which the creditor, expressly, takes it as such. For instance, it has been held, that where he gives a receipt, at the foot of his bill, for the note, as "in full of the above bill," there is evidence for a jury of its being taken in satisfaction of the debt, and therefore, in discharge of the lien.[2]

In Crean *v.* M'Fee, it was held, that the taking and entering of a judgment bond, after the filing of a claim, was not a satisfaction of it. The Court say:—"In Thompson's case, 2 Browne's Rep. 297, the precise question, now raised, was decided, in favour of the mechanic's claim. Judge HEMPHILL, then President of this court, in an opinion very carefully prepared, rested the decision on the doctrine of merger or *extinguishment* of an inferior security, by the acceptance of a superior one; and, viewed in this aspect, thought the judgment could not be considered of a higher rank than the claim filed. Were we restricted to the application of this doctrine, we should, probably, arrive at a different conclusion. But we think the proper interpretation of the mechanic's lien Act of 1806, brings to the claimant's aid another principle of law, strictly apposite, on the facts of the case, and equally available, to sustain the Auditor's report.

"We regard the individual furnishing materials, or

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[1] Kinsley *v.* Buchanan, 5 W. 118. Johns *v.* Bolton, 2 J. 339.

[2] Jones *v.* Shawan, 4 W. & S. 257.

doing work, in the construction of a building, and, afterwards, filing his claim, so as to acquire the benefits of the Act of Assembly, to be entitled to several concurrent remedies to enforce his debt. The lien under the Act, is but a *collateral* security, which may be made efficacious, by suing out a *scire facias*, or by resort to a personal action, at the option of the claimant, by express direction of the supplementary Act of 1808. The claimant has, also, a concurrent remedy, by a personal action, when, as here, the owner of the building was the contractor of the debt; and should the building be sold within two years from its commencement, the debt would, notwithstanding the prosecution of the personal action to judgment, retain its preference, secured by the Act over *subsequent* liens. The taking of the bond, &c., and entry of judgment thereon, was a procedure not differing, in its legal incidents, from a mere personal action; although in Williams *v.* Tearney, 8 S. & R. 56, it was held not sufficient to fulfil the requisition of the Act, in respect to the institution of an action, (*where no claim is filed,*) within six months from the furnishing of materials, or the performing of work."[1]

Where, however, time is given to the contractor, the principal debtor, by the mechanic or material man, it seems, that the building, which is the surety, is discharged. We give the opinion of the court in the late case of Hill *v.* Witmer, upon this subject, at length,

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[1] 2 M. 214. See, however, Lewis *v.* Morgan, 11 S. & R. 237. Williams *v.* Tearney, 8 S. & R. 59.

because it is the only one of which we have knowledge, in which the point is discussed.

"This is a *scire facias* on a mechanic's claim. The executor of the owner pleads, that Gilbert Low, the contractor, made a contract with the decedent to erect two houses, within nine months from August 3rd, 1853. The plaintiff on the 1st of February, 1854, after the materials which are the subject of this claim were furnished, accepted Low's note, payable in ninety days from the 1st of February, 1854, for the price of the materials, and agreed, in consideration of the delivery of the said note, to extend and give time to said Low, for the payment of said price, for ninety days.

"The defendant, before the note fell due, paid Low the full amount of the contract price. There is another plea, setting forth the additional fact, that defendant had no notice of the lien when he paid the contractor.

"The owner of a building, or rather the building itself, when erected by contract, stands, very much, in the relation of a surety for the contractor. We are now to decide whether those equitable principles which have been adopted in regard to principal and surety, shall be applied to this relation of contractor and owner. It appears settled, in England, that, even a covenant not to sue the principal, with an express reservation of all remedies against the surety, does not discharge the latter; for the equity of the surety is not affected. Upon payment of the debt, by the surety he has a right to immediate recourse against the principal, by the very terms of the principal's agreement with the creditor.

"Whether this is so in this state, has never been expressly decided.

"As far as appears on the pleadings, there was no reservation; and if the contractor and owner do, really, stand in the relation of principal and surety, we are bound to apply to it the familiar rule, that time given, by a binding agreement, to the principal, without the consent of the surety, discharges the latter. The owner had a right, as soon as the work was done, to pay the mechanic, and either deduct the amount from the contract price, or, if he had already paid, proceed, at once, against the contractor, to secure his reimbursement. The act of the creditor, the mechanic, or material man, in giving time to the contractor, impaired this right. He could not proceed, until the time expired, and this delay might be the cause of final failure to recover.

"Let us examine, whether there is anything in the decided cases which ought to prevent us from adopting a principle which seems required by analogy, and is, obviously, so just and reasonable.

"In Kinsley *v.* Buchanan (5 W. 118,) in which it was held, 'that an acceptance of a note from the contractor is not a relinquishment of the mechanics' lien,' the note was payable on demand, and no time was given. Johns *v.* Bolton (12 Penna. State Rep., 340,) is a case which, so far as concerns this point, is not fully reported. It is stated, that before the lien was filed, the defendants, (that is, perhaps, the contractors,) gave to the plaintiffs a note, on account of the work done, which was dishonoured, and taken up by the

plaintiffs. There is no argument on this point, and the court take no notice of it. They reverse, for certain errors, and add, generally, that the other errors not abandoned are sustained. It is probable that this is one of those abandoned. It is evident, however, that there is nothing, in the case, to show time given by a binding agreement. Where a creditor accepts the debtor's note for a precedent debt, payable at a future day, it is *prima facie*, only collateral; and if he does not part with the note, or produces it on the trial, he may sue an hour afterwards, Weakley *v.* Bell, (9 W. 283.) In the case before us, there is an express averment of such an agreement, to give time in consideration of giving the note, which the demurrer admits.—Judgment for defendant.[1]

Points of some interest are presented, in the cases, connected with the doctrines of set-off, and the appropriation of payments.

It appears, that a debt due to the contractor, by the claimant, may be set off.[2]

In Harker *v.* Conrad, it was held, that, where a material man had separate liens, for materials furnished to two several houses, and received a payment from the debtor, without any actual appropriation of it; and then, allowed one of his liens to expire, he could not, subsequently, appropriate the payment to the lien that had expired, to the prejudice of a purchaser of the premises bound by the other lien.

The court say:—"The case, then, was just this;

[1] 13 Leg. Int. 69.

[2] Gabell *v.* Perry, 1 H. 181.

the plaintiffs had separate demands, in respect of different houses, and liens on those houses, respectively, which were equally permanent, or, what is the same thing, the means of making them such. A payment was made, without actual appropriation, by either party, and the plaintiffs, after having suffered one of their liens to expire, claim a right, at the trial, to appropriate the payment to the discharge of their demand, in respect of which their lien had so expired; and this, against a person who had become a purchaser, without notice, of the property, on which, according to this mode of appropriation, there would be a subsisting incumbrance. Although, as between the immediate parties, the creditor has a right to appropriate, where the debtor has failed to do so; yet this right must be exercised within, at the furthest, a reasonable time after the payment, and, by the performance of some act, which indicates an intention to appropriate. It is too late to attempt it at the trial; and, were it otherwise, there would, in the absence of an actual appropriation by the debtor, be no rule on the subject, but the will of the creditor, which would, in all cases, be decisive. But such is not the fact. In default of actual appropriation, the matter is to be determined by rules and circumstances of equity. The debtor has a right to make the application, in the first instance, and failing to exercise it, the same right devolves on the creditor: but, where neither has exercised it, the law, nevertheless, presumes, in ordinary cases, that the debtor *intended* to pay, in the way which, at the time, was most to his advantage. Thus,

if it were peculiarly the interest of the party, to have the money received in extinguishment of a particular demand, the law intends, that he paid it in extinguishment of such demand, and, that the omission to declare his intention was accidental. Such intendment is reasonable and natural, and one which will, in most cases, accord with what was, actually, the fact: it is, therefore, equivalent to an exercise of the party's right, by acts, or an express declaration of intention. Where, however, the interest of the debtor could not be promoted by any particular appropriation, there is no ground for a presumption of any intention, on his part, and the law, then, raises a presumption, for the same reason, that the payment was actually *received*, in the way that was most to the advantage of the creditor. I think these principles, as furnishing general rules, may fairly be extracted from the cases. Then, according to this, if the controversy was between the original parties, it would admit of a doubt, whether the payment ought not to be considered as having been made on the foot of the account, for materials furnished to the houses in Fourth street; because, by having it so applied, the plaintiffs would secure their whole demand, without the expense and trouble of filing their lien against those houses: whilst Harker and Thorn would not have been benefited, by having it applied to either demand, in particular. But the introduction of a purchaser, without notice, into the case, leads to an opposite result. He stands in superior equity to Harker and Thorn, who were bound in conscience, to protect the title which they had con-

veyed to him, and who, there is, therefore, as much reason to presume, intended to make this payment, for his benefit, as there would be to presume, that they intended to apply it in the way most conducive to their own interest, if a particular application of it could have produced an equal benefit to themselves. The law ought to presume, and does presume, that every man is governed by the dictates of conscience, and that he will do what honesty requires of him, even though it be against his interest. Such a presumption can prejudice no one, nor does it injure the plaintiffs here. They were bound, by every consideration of equity, to perpetuate their lien on the houses in Fourth street, and thus, while they secured themselves, to cast the burden on those whose duty it was to bear it. Having failed to do so, the purchaser stands in superior equity, also, to them; and they must, therefore, bear a loss which arose entirely from their own neglect, and which it was their duty to prevent."[1]

In a case arising with respect to the same parties, it was held, that where an owner, after being supplied with lumber to erect a building, became the holder of a note of the lumber man, payable in lumber, the note extinguished the debt, *pro tanto*, and prevented the lumber man from filing a claim for more than the balance due to him from the building; and, that the owner and the lumber man could not, afterwards, by agreement, apply the note to the extinguishment of a

[1] 12 S. & R. 301.

debt for lumber subsequently supplied to another building, against which no lien had been filed, to the prejudice of a purchaser of the first building.[1]

A mechanic's lien may be discharged by circumstances amounting to an estoppel.

Thus, a judgment against the claimant, in a personal action, for the same debt for which a claim is filed, will bar a *scire facias* on the claim. It is a record estoppel.[2]

So it may be lost by an estoppel *in pays*. Where a person having such a lien stands by at a public sale, and encourages a person to buy at a full value, without disclosing his right, his claim may be barred or, at least, postponed.

A mere omission, however, to proclaim his lien will not have that effect.[3]

Of course, a sheriff's sale discharges the lien, as against the realty. The claimant is referred to the proceeds, but the purchaser takes the premises free of the incumbrance.

In a late case, not yet reported, it has been held, that a destruction of the building for which the work has been done, or the materials furnished, by fire, or otherwise, discharges the lien.

Lewis, Ch. J., in delivering the opinion of the court, says: "The equity of a mechanic's lien upon a building is founded upon the labour and materials furnished by him, in constructing it. That the land on which

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[1] Hopkins *v.* Conrad, 2 R. 316.
[2] Whelan *v.* Hill, 2 Wh. 118.
[3] Kline *v.* Lewis, 1 Ash. 31.

the building stands goes with the building, in case of a sale, is the result of necessity, because the building cannot be enjoyed without it. The legislative provisions are founded on that necessity, and do not change the character of the lien, in this respect. It is not founded on any contract with the owner of the land. It is not, necessarily, one of his debts. It may be created by a contractor, who has already received from the owner full compensation for furnishing the materials and erecting the building. Attaching itself to the building, and depending upon it for existence, the lien must, necessarily, share the fate of the building. No amount of labour or materials furnished, for the erection of a building, would create a lien, if no building should be erected. So, if the building, after erection, should be destroyed by accident, before the ground on which it stood, passed to a purchaser, the lien would be gone. The reason for binding the land is gone, with the building. Any other construction would defeat one of the objects of the law, which was, to promote the improvement of the country, by encouraging mechanics and material men to furnish labour and materials in erecting buildings. But if the lien continues on the land after the building is destroyed, how are those who erect the new buildings on the premises to be protected? Their equity against it is undoubtedly superior to the claims upon the building that was destroyed. And, yet, the latter, if they exist at all, must be preferred to the former. Under such a rule all further improvement on the premises might be prevented. In

this case, the court held, that a mechanic's lien against a former building was good against one erected afterwards, although, neither the labour nor materials on which the claim is founded were performed or furnished for the building thus charged. In this we think there was error. It follows from what has already been said, that the equity of the claim does not extend to the ground, except when it becomes necessary to the enjoyment of the building. The words of the statute are in accordance with this principle. They give the lien upon the 'building' alone in the first place, and, then, by a subsequent erection, this lien is declared to 'extend to the ground *covered* by *such building*, and to so much other ground immediately adjacent thereto, and belonging in like manner to the owner of *such building*, as may be necessary for the ordinary and useful purposes of *such building*.' The words '*such building*' refer, exclusively, to the building for which the materials were furnished, and work done, and to no other. When the ground ceases to be 'covered' by 'such building,' before the lien is filed, the lien ceases as a matter of course."[1]

In another late case, however, it seems to have held that it was no defence against the lien to show, that the building was taken down on account of its improper construction.[2]

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[1] Third Ass. Ref. Presb. Ch. *v.* Stetler, op. delivered March 22, 1856. 13 Leg. Int. 116.

[2] Odd Fellows' Hall *v.* Masser, 12 H. 510.

PART V.

OF THE JURISDICTION OF COURTS AND PRACTICE UNDER THE LAW.

CHAPTER I.

GENERAL REMARKS UPON THE PROCEEDING.

It has been settled, by many decisions, that the claim of the mechanic and material man, and the proceedings thereupon are, simply, *in rem*. They are so entirely so, that, if the premises affected by the claim be discharged, in any manner, the proceedings terminate. They cannot continue, even for costs. If they do proceed, with or without a discharge of the land, the judgment is not one of the ordinary character, but a special one against the premises, authorizing no process *in personam*, or against other property.[1]

We shall refer, hereafter, to the personal remedy of the creditor against the one with whom the contract to do the work or furnish materials was made. If this person be a contractor, and not the owner, the

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[1] Holden *v.* Winslow, 7 H. 457. Matlack *v.* Deal, 1 M. 254. Anschutz *v.* M'Clelland, 5 W. 487.

latter is under no personal liability whatever. He simply subjects his house to the burden.

We have, heretofore, taken occasion to notice the looseness allowed in the proceedings upon these claims, the great indulgence shown to the mechanic, and the inconsistencies of the decisions. These will appear, manifestly, as we proceed.[1]

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[1] See *ante*, p. 37, *et seq.*

CHAPTER II.

OF THE JURISDICTION OF COURTS.

Under the 11th section of the Act of 1836, the claim must be filed in the court of "the county in which the building may be situate." No provision appears to be made for a case in which the premises lie partly in one county and partly in another.

The jurisdiction of courts, within the proper county, is generally determined by the amount in controversy, as in other cases.

In most of the counties of the state, the Court of Common Pleas is the proper tribunal, to take cognizance of these proceedings.

Prior to the Act which we are about to mention, the District Court for the city and county of Philadelphia had the jurisdiction in all cases where the lien filed was for more than one hundred dollars, and the Court of Common Pleas, where the claim was for less than that amount. But, by an Act of May 8th, 1854, the Court of Common Pleas has, now, concurrent jurisdiction with the District Court, in all cases in which the same does not exceed five hundred dollars.

Where the claim gives jurisdiction from its amount, the fact that it is apportioned for sums less than that

necessary to give such jurisdiction, so that the writs of *scire facias* against each house will, also, be for less, does not oust the jurisdiction.

Indeed, in one case, where the entire sum was over one hundred dollars, the court having jurisdiction over that sum was held to have *exclusive* cognizance.[1]

To prevent any doubt upon this subject, an Act of April 10th, 1848, gave the District Courts of Philadelphia, Lancaster and Allegheny counties jurisdiction, notwithstanding the apportioned claims should be less than the sum of which they have jurisdiction, and confirmed prior proceedings, in such cases.

It was held, in one of the earlier cases, that a claim under these Acts could not be filed before an alderman.[2]

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[1] Woodruff *v.* Chambers, 1 H. 132. Curry *v.* Spink, 11 H. 58.
[2] Wh. Dig. 5 Ed. pl. 155.

CHAPTER III.

OF THE PARTIES TO THE PROCEEDING.

The question, who shall be parties to the proceedings under these Acts, must be considered, with reference to the claimant as well as the defendants, and in doing this we shall treat first of the claim and then the *scire facias*.

The Acts of 1803 and 1806 speak of a claim, but no provision is made as to its form in this or any other respect.

It is difficult, however, to understand how a claim can be filed, without specifying the name of the claimant.

The Act of 1836, expressly, declares, that "the name of the party claimant must be set forth."

He is undoubtedly, therefore, a party of record; and any omission of his name would, probably, be a fatal defect, and render the claim inoperative.

We shall defer our remarks upon the mode of stating the name of the claimant, until we come to speak of the form of the claim.

We may, however, refer, in this connexion, to a case in which it was held, that, where an architect contracted with the owner to build a house, and afterwards, took a partner in with him, in the work, the

two could not join in filing a claim, because the owner had made no joint contract with them; but, it is, doubtfully, intimated, that the incoming partner might have filed a claim for himself, against the owner and contractor together, if the facts permitted it.[1]

Of course, except in case of death, the party claimant would, also, be the one in whose name the *scire facias* issues. Where a claim is assigned or marked to the use of another, the proceeding must continue in the name of the assignor, as the legal plaintiff.

We next come to those against whom the claim is filed, or the parties defendant, in the proceeding. The cases bearing upon their relation to the record are much more numerous, than those in reference to the claimant; though the earlier Acts are equally silent as to both.

In Christine *v.* Manderson, it is said: "The Act of 17th March, 1806, does not require, that the claim shall contain the name of the owner or contractor. It makes the building subject to the debt contracted for materials furnished or work done in erecting it. The claim, therefore, in the present instance, would have been good, though it had not stated, as it does, the name of the owner or reputed owner."[2]

In another case, a claim "against the owners or reputed owners," "and against all other person or persons, owners or possessors of said building," was held sufficient.[3]

In Hampton *v.* Broom, a claim was filed, prior to

[1] Barker *v.* Maxwell, 8 W. 478.
[2] 2 B. 364.
[3] Harker *v.* Conrad, 12 S. & R. 301.

the Act of 1836, which described the house; but no mention is made, in the report of the case, of any statement in the claim of the name of owner or contractor. A *scire facias* issued upon it against O., as contractor, and L. as owner, on the trial of which, the person named as owner proved, that he was not such, and judgment was given against the plaintiff. A second *scire facias*, on the same claim, was, subsequently, issued, against O. as contractor, and B. as owner, to which the defendants pleaded the prior judgment as a "former recovery." In answer to the argument against such a plea, that the former *scire facias* was not between the same parties, it was urged, that the claim upon which both writs were founded was the same; that the Act of 1806 did not require a specification, in the claim, of the name of the owner or contractor, but was satisfied by a description of the building; that, in Savoy *v.* Jones, 2 R. 343, it had been distinctly decided, that the credit was given, not to the owner, but to the building, "the object of the legislature being to enable the mechanic or material man to follow his labour or materials into the building, which is pledged for the price, without regard to the estate of the owner;" and, that this doctrine, taken in its widest extent, certainly implied, that no obligation existed, on the part of the mechanic or material man, to look to the title or authority of the person who might choose to erect a building on a lot of ground.

The court appeared to concede the force of this argument in favour of the plea, as far as it went, but decided, that the question turned upon the Act of

1808, which required the *scire facias* upon the claim to be "against the debtor and owner of the building, or the executors and administrators;" and that it was competent, upon a trial, for either of the defendants, to prove, that the one named as such was not the real owner, and thus defeat the action; and, that, therefore, the judgment upon the first *scire facias*, in favour of the one who was not the owner, was no bar to the second *scire facias*, against the true owner.[1]

This case shows, most conclusively, that, under Acts prior to that of 1836, it was competent for a claimant to file his claim, without any mention of the owner or contractor, and, that, if, in his *scire facias*, he mistook their names, he might discontinue, or become nonsuit, and issue new process, on the same claim, against other persons.

Notwithstanding this license, however, the practice seems to have been, to mention the name of the contractor, and owner, or reputed owner. And, in one case, in which a mistake was made in the name of the owner, the court seem to have considered the error fatal.[2]

While the legislation with reference to the form of the *claim*, in this respect, was so deficient, the Act of 1808 provides for a *scire facias* "against the debtor and owner of the building, or their executors or administrators."

The word "debtor," in this Act, was intended to refer to the person who is called, in the Act of 1836,

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[1] 1 M. 241.

[2] Hays *v.* Tryon, 2 M. 208.

the contractor. And it was held, at an early period, that he must be made a party. The court say: "There is great reason why the contractor should be made a party to the proceeding on *sci. fa.*, though the judgment and execution on it can only affect the house. He, alone, knows the persons who supplied the materials, the price at which they were to be furnished, and who did the work and the price agreed on. If he contracted to finish the building, for a certain sum, he may become liable to the owner, who has been compelled to lose his house or pay debts on it. Justice to the owner and to the contractor, then, requires, that the debtor be a party to the *sci. fa.*, as well as the owner of the building; and this Act is express, that he shall be a party, and prescribes even the mode of service on him."[1]

The Act of 1836, is still more explicit, in this respect; and the case of Barnes *v.* Wright, already cited, under the Act of 1808, seems entirely applicable to its terms. The contractor must, it would appear, be a party. And if one not the contractor be made a party, as such, the error will be fatal.[2]

Where there is no contractor, however, but the owner, no other can, of course, be introduced; and it is not necessary, it would seem, to call the owner contractor, if he is made a party as owner.

In Knabb's Ap. the court say:—"Harper is named as owner, or reputed owner, and no one is designated

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[1] Barnes *v.* Wright, 2 Wh. 193. See Rogers *v.* Klingler, 3 Wh. 335.

[2] Davis *v.* Stratton, 9 Leg. Int. 11.

as contractor, architect, or builder. This is the third exception. But the Act requires, in express terms, a contractor to be named, only, where the contract was made with a builder, distinct from the owner of the building; and the decisions have not extended these terms beyond their obvious meaning: Jones *v.* Shawan, 4 W. & S. 262; Sullivan *v.* Johns, 5 Wh. 366. To be sure, in the latter case, it is observed, there is no objection to naming an owner, who built the house for himself, as owner, or contractor, or both. It is so done, in this instance, in the claim filed by Davis and Whitaker. But there is no imperative necessity for this. It has even been said, that, as the name is only a circumstance of description, to specify the property, entire accuracy as to the ownership may not be indispensable. Certain it is, the proceeding being *in rem*, the object, in stating the names of the parties connected with the structure, is a designation of the thing and not of the person. This object is, generally, effected by naming the owner, alone. Still, where there is also a contractor, builder, or architect, conformity with the statute requires him to be named. What would be the effect of a neglect to notice him, in a proper case, we are not called on to declare, since it no where appears there was, in this case, a distinct contractor."[1]

In Richebaugh *v.* Dugan, the defendant offered to show, that there were two contractors; only one being named. The court disregarded the offer, on the ground, however, that it was not pleaded in abatement.[2]

[1] 2 Wh. 193. [2] 7 B. 394.

In regard to the owner, there is more difficulty. In the case of Hampton *v.* Broom, just referred to, it appears, that, under the Act of 1808, if made a party to the *scire facias*, he must have been correctly named; and, that any omission or defect, in this particular, was fatal.

The practice seems to have arisen, under this enactment, of filing a claim and issuing a *scire facias* against some person, as "owner or reputed owner." In one of the cases, already referred to, the court say:—"Undoubtedly, the plaintiff ought to have made the owner a party, and have service made upon him, if he knows him. That is, frequently, however, not in his power, owing to unknown transfers, and apparent ownerships; and, hence, the practice of proceeding against a reputed owner, since incorporated into the Act of 1836."[1]

In Anshutz *v.* M'Clelland, a building was erected by a lessee, who made the contract, with the knowledge of the owner. The court held, that under the circumstances, claims filed against the lessee and contractor alone, were sufficient, and, that, under the proceedings upon such a claim, the whole fee of the land might be sold. The court, however, in its decision presents views which are applicable here. It says:—"It may be, that where the owner of the house is not made a party to the *scire facias*, he may not, thereafter, be precluded from setting up any defence, in an action of ejectment brought against him by the purchaser at sheriff's sale, which he might have made in

[1] Christine *v.* Mandersen, 2 B. 365.

the *scire facias*, had he been warned by it. The Act of 1808, which authorizes the suing of the writ of *scire facias* upon a mechanic's lien 'against the debtor and owner of the building,' to notify them to show cause, if any they have, why the plaintiff should not have execution for the amount of his debt, against the building, can only be considered directory, so far as it provides for the *scire facias* being sued out against the *owner:* it would be attended with great inconvenience, as well as tend to defeat the purpose of the Act, if it were to be held otherwise; for the owner may, or may not be known to the creditor; and it was, certainly, not the intention of the legislature, that his security for the payment of his debt, or that his remedy for recovering it should be lessened or diminished, in the least, because he might not know the owner; and if the owner, when not made a party to the writ, be permitted to defend in the ejectment, as he might have done in the *scire facias*, had he been warned, in pursuance of it, no injustice or injury can accrue to him, from his name being left out of it."[1]

This was the state of the decisions, under the earlier Acts, in regard to the owner. The twelfth section of that of 1836 provides, that every claim must set forth: "The names of the party claimant and of the owner or reputed owner of the building, and, also, of the contractor, architect or builder, where the contract of the claimant was made with such contractor," &c.

The difference between this enactment, and that in

[1] 5 W. 490.

the Act of 1808, in reference to the *scire facias*, appears to be, that the latter, merely provides, for a *scire facias* "against the debtor and owner of the building," without any words requiring them to be made parties; while the Act of 1836, declares, that the claim "*must* set forth," as we have above recited. The decision, therefore, in Anshutz *v.* M'Clelland, that the words of the Act of 1808, on this subject, were merely directory, cannot be considered as applicable to the present statute.

In that case, the argument is pressed, that the claimant may not know the owner. The Act of 1836 expressly provides for such a case, by allowing a claim to be filed against a "reputed owner."[1]

But it appears, from the cases under this Act, that, where the claim purports to declare the name of the owner, and mistakes it, altogether, the error is fatal.

In Noll *v.* Swineford a claim defective, in this respect, was held to be invalid. The court say:—"There is a wide difference between misnaming a defendant, natural or artificial, which was the fact in all the cases cited on this point, by the plaintiff in error, and omitting, altogether, to bring into Court the only proper party, by process duly served. The first error can only be objected to by plea in abatement; but the second would seem to be fatal, in every step of the cause; for the simple reason, that the plaintiff, in personal actions, must, of necessity, fail, in his proof, to charge the party improperly sued; and where the proceeding

[1] See Jones *v.* Shawan, 4 W. & S. 262.

is *in rem*, because he has given no notice to those whose privilege it is to take defence."[1]

In Bruner *v.* Sheik, an Insurance company rebuilt a house partially destroyed by fire, in fulfilment of the covenant in the policy. A material man filed a claim in which he named the company as owner. The court held, that, after the Act of 1840, such a claim could not bind the fee, but only the interest of the company, which was nothing, and add: "So well were the parties aware of this, that, only the company was required to appear and plead; and by not ruling the other defendants to appear and plead, also, the plaintiff evinced a consciousness, that they were not answerable. For want of it, a judgment in his favour would, at all events, have been erroneous."[2]

In a case in the District Court for the city and county of Philadelphia, the defendant, who was sued as owner and contractor, alleged, that he never was either contractor or owner. The court say: "It may be, therefore, that he cannot be damaged by this proceeding, which is still purely a process against the thing. Still, however, that a judgment against him as contractor in this proceeding, in which he has been summoned, would be evidence against him, in a personal action, has never been decided; but we think, that the plaintiff, having chosen to make him a defendant, he has a right to take this defence, and that, if substantiated, it must be fatal to the plaintiff's lien and proceeding."[3]

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[1] 6 B. 187. [2] 9 W. & S. 120.

[3] Davis *v.* Stratton, 9 Leg. Int. 11.

In the case of an apportioned claim, there appears to be a greater necessity, than in others, to be accurate in this respect. In such case, the owners of all the houses must be the same, or the lien is not within the provision of the Act.[1]

A question of some moment arises, under this head. Must the person named as owner, in the claim, be such, at the commencement of the building, at the time of doing the work or furnishing the materials, or at the time when the claim is filed? What notice, if any, must be taken, in the proceedings, of such changes of title?

In a case arising under the Act of 1836, a claim was filed against a person, as contractor, who, at the time the work was done, was owner; and against one as owner, who became such after that time. The proceedings were sustained. The court say: "Naming a person as contractor, or owner, or both, when he was such at the time of the contract, would seem to be liable to no objection, arising either from the words or spirit of the act; nor is any error perceived in filing the claim against a person who has become the purchaser after the building is finished, but before the claim is filed, and who remains the owner, or who is the reputed owner, at the time it is filed. The owner complains with a bad grace of a proceeding, which gives him notice of the lien on his property, and, at the same time, an opportunity to make a defence, and which subjects him to no personal liability whatever."[2]

[1] Gorgas *v.* Douglas, 6 S. & R. 520.

[2] Sullivan *v.* Johns, 5 Wh. 369.

In Jones *v.* Shawan, it was made a question, whether a person who purchased the premises, after materials were furnished, but before a claim was filed, *must* be made a party to the claim.

The court, Gibson, Ch. J., says,—"The direction, that a claimant is not bound to file against one who was not the owner when the building was commenced, is not erroneous. The Act of 1803 provided for debts contracted by the owner, and, consequently, by him who was owner, when the work or material was ordered. That act was superseded, not to change this provision, but to provide for cases in which the debt has been incurred, not by the owner, but by a builder or contractor. Still, where the owner is, himself, the builder, the claim must be filed against him, as the person known to the creditor, and not his unknown successor in the title. Though a subsequent terre tenant has intervened, the claim is, necessarily, to be filed against his predecessor; and why should there be another rule for a debt incurred by a contractor? As there is no reason for a difference, I take it, the name of the original owner may safely be used. But as the claim is against the building, instead of the person, and, as the name is only a circumstance, of description, to specify the property and give notice to purchasers, entire accuracy in regard to the ownership may not be indispensable; the more so, as the statute expressly requires no more than the name of the reputed owner; and it might be sufficient to file it against the past, or the present one. It is certain, however, that the name of the owner when the build-

ing was commenced, satisfies the requirements of the law. A creditor may have occasion to file one claim against several houses, apportioning to each, its part of the general burden; and how would he be able to dispose of the names of intervening purchasers of separate interests? He ought not to be charged, in such a case, with the difficulty of discriminating; nor could he, perhaps, discriminate; for where the claim is a joint one, the ownership ought to be joint. But, having filed his claim against the original owner, the *scire facias* must conform to it, nor is there a provision for bringing in the purchaser as terre tenant. In Anshutz *v.* M'Clelland, (5 Watts, 487,) a *scire facias* was held to lie against a lessee for years, only, when the claim has been filed against him as the person who employed the claimant. This, too, shows, that the tenant of the freehold, at the filing of the claim, is not, necessarily, the person to be named."[1]

It would appear, from these cases, that, where the owner, at the time the contract is made, or the work done or materials furnished, is, also, the contractor or builder, he must be made a party; but that if he be not when the claim is filed, either he or the owner at that time, may be the defendant.

It will, also, be remarked, however, that it is strongly intimated, that if the owner, at the time of the issuing of the *scire facias*, is not warned, he may not be precluded, "from setting up any defence in an action of ejectment brought against him by the purchaser at

[1] 4 W. & S. 262.

sheriff's sale, which he might have made, in the *scire facias*."[1]

Perhaps the safest way is, to file the claim against the person or persons who was or were owner and builder, or contractor, at the time the contract was made, or the work done or materials furnished, and give notice to the person who is the owner, when the writ issues.

Whether a person, however, is made a party or not, he can, in respect of certain interests, make himself a party, by coming in to defend.

In the case of M'Adam *v.* Baily, a person who held mortgage against the property, executed subsequently to the commencement of the building, asked to come in and take defence, and he was allowed to do so. The court say:—"The *sci. fa.* is expressly directed to be served on the premises; and, as a terre tenant would be concluded by a judgment in the proceedings, he may, of course, come in and claim to take defence. But, is the mortgagee a terre tenant? He, evidently, to the extent of his security, is liable to be cut out by mechanic's liens; he has an interest, and why should he not be heard? It has been said, that so has any judgment creditor an interest to be affected. The difference between a judgment creditor and a mortgagee is very plain. The latter has a title, *jus in re* as well as *ad rem*. For all purposes essential to the maintenance of his security, he is the legal owner.

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[1] Anshutz *v.* M'Clelland, 5 W. 490. Christine *v.* Manderson, 2 B. 363.

He is a purchaser, within the statute 27 Eliz., may recover the possession by ejectment, and have a writ of *estrepement* to stay waste. It is very plain, that, when an estate is incumbered much beyond its value, it may not be sufficiently important to the insolvent owner to induce him to spend time and money in controverting particular claims. Very gross injustice might result, if the mortgagee, who has as much advanced his money on the faith of this specific property, as the man who may have taken an absolute title, could not be allowed to take defence in this case."[1]

It will be found, that many of the most important questions under the mechanic's lien law, have been presented by the objections of other lien creditors, before auditors appointed to distribute the proceeds of sheriff's sales of lands affected by such liens. These cases we shall refer to more particularly hereafter.[2]

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[1] 9 Leg. Int. 30.

[2] Knabb's Ap. 10 B. 191. Lauman's Ap. 8 B. 473. Thomas *v.* James, 7 W. & S. 381.

CHAPTER III.

OF THE CLAIM.

We shall, for greater clearness, present this subject of the claim, first with reference to its form, second, the filing of it.

We have already remarked upon the peculiar indulgence which our courts have extended to the practice under these Acts. In no part of the proceeding has this indulgence been shown, more decidedly, than with reference to the claim and its form.

The Act of 1803 provided, that the debt for work and materials should not remain a lien longer than two years, "unless an action for the recovery thereof be instituted, or *the claim filed*, within six months after performing the work, or furnishing the materials." Similar words are found in the Act of 1806.

It will be seen, that, both the action and the claim are spoken of as modes of continuing the lien.

It is manifest, from the language of the earlier Act, at least, that it contemplated the case of a person building on his own ground. It provides, only, for a debt contracted by the owner, and had regard to a remedy *in personam*, as well as *in rem*, which would continue the lien and recover the debt. But it gives no indication of the character of this "action." Whether, prior to the *scire facias* given by the Act of 1808,

the action was to have been on the claim; or, what relation the claim had to the action, does not appear.

In Steinmetz *v.* Boudinot, an action of assumpsit, was brought for bricks sold and delivered, against the *owner*. The court say upon this point: "There is a powerful objection, too, to the form of this action. If judgment be entered against the defendant, he is liable, *personally*, for the amount of the judgment. But that would be most unjust, even supposing a lien to exist, if his liability is only in consequence of the lien, and not because he contracted the debt, himself. If an action on the case can be supported, I should think it ought to be special, and to mention the manner in which the defendant is liable, in order that a special judgment might be entered, not affecting the *person* of the defendant, but the *building only*."[1]

In a still later case, it was held, that taking a bond and warrant of attorney from the owner, and causing judgment to be entered on it, were not the institution of an action, within the meaning of the Act.[2]

In Rogers *v.* Klingler, a material man brought an action of assumpsit against the *contractor*, filed a copy of the book entries upon which the action was brought, took a judgment for want of an affidavit of defence, and sold the house. In an ejectment for the premises, the question arose, whether any title passed by the sale, under such a proceeding. The Court, without deciding, whether that was the species of action indicated by the Acts in question, held,

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[1] 3 S. & R. 542.

[2] See Bickel *v.* James, 7 W. 9.

that by the Act of 1808, "it was only one having a claim filed," who could recover by personal action, or by *scire facias*, and that, as no claim was filed by the plaintiff, his suit was not within the Act. But it further says: "I will not say, that if the plaintiff had brought a special action on the case, against the contractor, setting forth the liability of the building, and obtained a special judgment thereon, and sale of the building, in conformity with the suggestion of Chief Justice TILGHMAN, above referred to, a sale within two years, might not have made the lien available. But that was not done here: the suit was personal, the recovery personal, and the execution and sale were only of the right of the defendant, the contractor. Even in the case I have supposed, however, the court would, I should think, require the owner, if within reach, to be made a party to the suit, or at least to have notice, and the opportunity of contesting the claim."[1]

But, without reference to this difficulty, in regard to the action, the Acts speak distinctly of a claim; and it was the habit to file such a paper long prior to the Act of 1836.

It is a mere *ex parte* proceeding. The paper is drawn by the party or his counsel, and filed, without any motion or application to the court. When filed, it is not a record, but is in much the same position as the registry of a mortgage.[1] It is, at once, entered upon the index of claims.

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[1] 3 Wh. 335.

No form was provided in the earlier Acts. The Act of 1836 gives some aid, in this respect. But, even since its passage, it has been said in one of the decisions:—"No particular form is prescribed for these instruments, nor has a general practice, under the statute, assigned to them a technical garb. The shapes they are made to assume, in different counties, and even in the same county, are almost as various as the intelligence and business tact of those who prepare them for the office files."[2]

It is said, in the same case, that the great object of the several provisions of the Act is notice,—the safety of owners, purchasers and other lien creditors.

By the Act of 1836, sec. 12, every claim must set forth:

"First, The names of the party claimant, and of the owner or reputed owner of the building, and also of the contractor, architect or builder, where the contract of the claimant was made with such contractor, architect or builder.

"Second, The amount or sum claimed to be due, and the nature or kind of the work done, or the kind and amount of materials furnished, and the time when the materials were furnished or the work was done, as the case may be.

"Third, The locality of the building and the size and number of the stories of the same, or such other matters of description as shall be sufficient to identify the same."

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[1] Davis *v.* Church, 1 W. & S. 242. [2] Knabb's Ap. 10 B. 191.

In their report to which we have already referred, the Commissioners say of this section: "In the 13th (12) section, it is proposed to declare certain points to be essential to the validity of the claim. The object of filing a claim is, to give notice to third persons of the names of the parties, the amount alleged to be due, and the property upon which the lien is claimed. Unless these are distinctly stated, it is obvious, that the notice is of little value. Many claims, however, have been filed deficient in these essentials, probably from want of sufficient precision in the law. It is believed, that the directions of this section can be followed by the lien creditors, without difficulty, and, that it will tend to facilitate their entering claims, without professional assistance."

We will take these provisions in their order, and show how far their terms have been construed by decision.

The first requisite of the Act is the names of the parties. How far these are essential, we have already stated, in treating of the parties to the proceeding.

Whatever indulgence or latitude the cases may allow, in this particular, the only safe rule is, to ascertain, with certainty, who claimant, owner and contractor are, and insert their names.

There can, of course, be no difficulty in ascertaining who the claimant is and inserting his name. He must be the person with whom the contract is made.

It has been held, in relation to this subject, that a claim may be filed and proceedings had, in the name

of a firm, without specifying the names of the individual parties.[1]

And it has, also, been held, that if the individual names of all the parties are mentioned, the firm name need not be.[2]

It is much more regular, however, to insert the names of the partners, as well as of the firm.

As to the owner, the particularity should be very great. It is his name that makes the record of the lien notice to purchasers and others, and upon a notice to him depends, under the decisions, the conclusiveness of the proceeding, and the efficiency of the final process.

If owners have changed, since the building began, it is better perhaps to make the owner, at that time, the formal party.

It has been made a question, whether, if all the proper parties are named, a designation of their respective titles of owner and contractor is essential; and how far a mistake in this respect will be fatal.

It would appear, from a case decided in the District Court of Lancaster county, that such a designation must be made. In that case a claim was filed against G. H. charging him as debtor in respect to the materials furnished. But there was no averment that he was owner, or reputed owner of the premises, which were simply described, as adjoining property of J. Z. and others. The claim was held bad. G. H. was, in fact, both owner and contractor, as far as appears from the report of the case. But the question of the neces-

[1] Black's Ap. 2 W. & S. 179. [2] Knabb's Ap. 10 B. 189.

sity of designating G. H. as owner, was so involved with another question, of the proper identification of the house, that the former can hardly be said to be decided.[1]

We find no decision of the Supreme Court, declaring such a designation essential. Perhaps, the better opinion is, that, being mere matters of description, a mistake or omission in this respect is not fatal.

Where the claim was against a building of which F. was owner, but the bill annexed charged the goods to the contractor, for F. and W's. buildings, it was held, that the inconsistency rendered the claim invalid.[2]

The omission of the initial of the middle name of the owner was held, not to be a valid objection to a claim.[3]

In regard to the specification required in the first part of the next clause, of "the amount or sum claimed to be due," there appear to have been no decisions.

The next words, however, "the nature or kind of the work done, or the kind and amount of materials furnished," have led to numerous questions.

We may say, here, to throw light on many of the cases to which we shall refer, that it is not essential, that the body of a claim should contain such a specification. It is sufficient if it be annexed to the claim, in the form of a bill or statement. The two, together, form the claim.[4]

It is better, that the bill should be expressly referred

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[1] Gilbert Hill's Est., 3 Pa. L. J. 323.

[2] Scott *v.* Senderling, 7 Leg. Int. 42. [3] Knabb's Ap. 10 B. 187.

[4] Id.

to, in the statement; though it is not, absolutely, essential, that it should be mentioned, if it appear to have been the intention of the claimant to make it a constituent portion of his claim.

There appears to have been no doubt, at any time, that work done and materials furnished might be included in the same claim. But it was held absolutely necessary to state, distinctly, the amount of each.

In Noll *v.* Swineford, the sum mentioned was stated to be due for work and for materials furnished between certain days; but there were no items, no statement of how much was due for each, nor any averment of a gross contract. The court held the claim to be defective, and say: "From a perusal of that portion I have extracted, it is manifest, the Act contemplates work and labour done, and materials furnished, as distinct and separate items, which, to be sure, may enter into and make part of the same claim, but not necessarily so, and when so, not properly to be confounded, or treated as one."[1]

This was followed by the Act of March 24th, 1849, which enacted,[2]—"That it shall be lawful for any mechanic, or material man, in the city and county of Philadelphia, and county of Chester, who performs work and furnishes materials, to include both in the same claim filed: and, where the value or amount of the work or materials can only be ascertained by

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[1] 6 B. 187. See, also, Lauman's Ap. 8 B. 478. Thorn *v.* Hough, 9 Leg. Int. 46. But see Bayer *v.* Reeside, 2 H. 168.

[2] This Act applies only to the city and county of Philadelphia, and the county of Chester.

measurement, when done, or shall be done by contract, for a stipulated sum, it shall be lawful to file a statement of the time when the work was commenced, and when finished, and of the aggregate price of the work and materials; and all claims heretofore filed in conformity herewith, and not decided, judicially, are hereby confirmed." We find, in one of the cases in the District Court for the city and county of Philadelphia, a claim filed, apparently under this Act.[1]

In a case in the court of Common Pleas, for the county of Philadelphia, it was objected to a claim, that it did not set forth the *kind* of lumber furnished, with sufficient certainty, when it described it as so many feet of lumber "third common." The court say:—"This, if a question, at all, was rather a question for the court and jury upon the trial. We are bound to presume, that "third common," is a kind of lumber; and it would be onerous to require too great a particularity in the specification of the quality."[2]

The bill annexed should, as far as possible, give the details of the work and materials. About the latter there is less difficulty than the former. The number or quality and kind of bricks or lumber, or of lime, furnished on each day, &c., should be given, with care and minuteness. The rules of evidence, which we shall refer to, hereafter, do not require, that the proof of each item, as to date and amount, should accord, exactly, with the statement. We mention this to show, that while, of course, the statement should be made, with a view to what is to be proved, the risk of the particularity

[1] Thorn *v.* Heugh, 9 Leg. Int. 46.

[2] Heron *v.* Robinson, 2 Pars. 248.

which is proper is not so great, as if entire agreement between the *allegata* and *probata* was indispensable.

In the case of continuing work, the only particularity, in this respect, that seems possible, is, in stating its nature, with the time taken and number of persons employed, and its cost or value. Where it is to be measured, a statement of the quantity ascertained by measurement, and its measurement value, should be given.

As to the course to be pursued, in case of a special contract, we shall speak hereafter.

The Act, further, requires a statement, in the claim, of "the time when the materials were furnished or the work was done."

Under this clause of the Act, many decisions have been made; but they are so confused and discordant, that it is extremely difficult to deduce from them any rule or guiding principle.

We ought to say, however, that the difficulty is not to ascertain from them what form of the claim in this respect is correct and regular, but, rather, the extent to which omissions and irregularities will be indulged.

Of course, the bill or statement annexed to the claim, and referred to in it, should, wherever it is possible, state the date of the work, or, if continuous, the days between which it was done; and, as to materials, the date of each delivery with the quantity delivered. As to cases of contract, we shall speak of them, with reference to this matter of time, hereafter.

No case has gone the length of saving the claim, when no date, whatever, was found, either in the claim or the bill annexed to it.

The body of the claim, usually, contains a recital, that the work was done or materials furnished, "within six months last past;" and the question has arisen, whether that is, by itself, a sufficient statement of time.

In Lehman *v.* Thomas, the court struck off a claim, in which no other statement of time appeared. In its opinion, the court say: "The materials are stated, in this case, to have been furnished within six months before the filing of the claim. For purposes of specification, it might as well have been six years. The statute requires the date to be inserted, not merely, that it may appear the claim was filed in time, but, to individuate the cause or subject of it. The claimant may have filled many orders of the contractor within the period, and it was, therefore, necessary to specify what was meant. A lumber merchant ought to be able to give day and date for every item; and, even a mechanic ought to be able to state the commencement and completion of his job, with convenient certainty. Where this can be done, it ought to be exacted; for it is a potent guard against imposition; and, to say nothing about any other exception, we are of opinion the time is too loosely stated." [1]

In a subsequent case, the same facts were presented. There was a date at the head of the bill, but no date of any of the items. The court say, speaking of the requisitions of the Act, as to amount and date; "All of these are, or ought to be, within the peculiar knowledge of the claimant, from his books or otherwise,

[1] 5 W. & S. 262.

and must be furnished by him, when filing his claim. When dispute arises, they are essential to the owner of the building, the purchaser, and lien creditor, to enable them to trace out the truth of the claim, and guard against error or imposition." And again: "In relation to the third class of requisites, the locality of the building, there is some latitude given; the Act allows "the size and number of the stories or *such other matters of description* as shall be sufficient to identify it." "But no such latitude is permitted in the first and second classes. The items are positively required; and this imperative requisition of the law we are not at liberty to dispense with or impair, by a strained construction. The claim filed in the present case is, in this respect, defective. There is no time stated in the claim or bill appended to it, at which the work was done or materials furnished, as the Act of Assembly requires. The date of the first of April, 1840, is, obviously, the date of the bill, and nothing else. The claim does not purport to state that as the time when the work was done or materials furnished; and, a forced interpretation of this kind, to sustain a claim, would establish a precedent, that would defeat the object which the Legislature had in view, in requiring the time to be stated."[1]

In a case prior to either of these last cited, the claim had omitted the year, though the days and months were stated. The court held the claim to be defective, and expressed similar views, as to the necessity of a

[1] Witman *v.* Walker, 9 W. & S. 186.

substantial compliance with the requisitions of the Act, and the materiality of such an omission.[1]

In a case of Noll *v.* Swineford, the claim was defective, on other grounds; but the matter of time was, also, involved in the decision. In that case, no bill was attached, but the claim set forth the sum claimed as due "for carpenter's work and labour done and performed in and about the erection of said building, as a carpenter, and for materials, to wit:—lumber furnished by the said Harry Noll, between the 29th day of June, 1843, and the 23d day of February, 1844," &c. The opinion of the court was delivered by Bell, J., who says:—"Another exception is taken to the validity of the claim filed here; namely, that it does not show the time when the alleged work was done, which is essential under the statute: Rehrer *v.* Zeigler, *supra*. Were it necessary, this objection would be well worthy of consideration; and, for myself, I may say, I do not perceive how it could well be answered. It is, to be sure, urged, that the dates stated under the *videlicit* refer, as well to the work, as to the lumber furnished. It seems to me it is difficult so to read it, without doing violence to the grammatical construction, as well as to the plain meaning of the sentence. Were this even conceded to be doubtful, it might be sufficient to say, the very concession proves the statement lacks, in this particular, that degree of certainty which ought to be exacted, and which it is so easy to confer on these papers." [2]

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[1] Rehrer *v.* Zeigler, 3 W. & S. 258. [2] 6 B. 187.

This is the last of the decisions of the Supreme Court, upon this subject, holding the mechanic to the substantial requirements of the Act. From its date, indulgence to that class of creditors began to be extended, and has now gone so far, as, in fact, to nullify the enactments upon this subject.

We do not include among the cases which we are about to mention that of Shaw *v.* Barnes, which was decided prior to the case of Noll *v.* Swineford, but is not even noticed by the judge who decided the latter case. It was a direct overruling of the prior decisions to which we have referred. But it can, hardly, be treated as authority, though it was, several times, afterward, cited as such, by the judge, himself, who there delivered the opinion of the court. He distinctly intimates, however, that upon a motion to strike the claim from the record, his views, as to its validity, might have been different, and, that he gets over technical objections, in order not to disturb the result of a trial on the merits, which had taken place.[1]

The same remarks, perhaps, might, properly, be made, with reference to Bayer *v.* Reeside, in which the opinion of the court was delivered by the same judge who delivered it in Shaw *v.* Barnes, and who, again, expressly declared, that his opinion was affected by the fact, that no motion to strike off the claim had been made, and, that the case was before him after a trial on the merits.[2]

But we come to others that are, perhaps, of more authority.

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[1] 5 B. 18. [2] 2 H. 168.

In Knabb's Appeal the bill annexed to the claim was as follows: "Nov. 15, 1846. To serving 63,200 bricks, at $5½ per thousand, $347,00." The Judge who delivered the opinion of the Court, says: "That furnished by Bean & Ullman has but one date. But, in the absence of contrary proof, they must be taken as designating the time when the bricks were furnished. It is totally unlike the appended bill in Witman *v.* Walker, 9 W. & S. 183. There, the account consisted of various items of marble furnished for the building: such as mantles, steps, ashler, &c., and of marble work, which must have been furnished and performed at different times; and yet, there was but a single date. 'It is obvious,' said Judge Sergeant, 'the date is the date of the bill, and nothing else.' But this cannot, certainly, be asserted of the present account. It consists of but one item: and, though not very probable, it is possible, the bricks may all have been furnished on the same day. Of this, the only evidence we have, is the bill itself, and it would be hazardous to assume a fact in contradiction of it, for the mere purpose of invalidating the lien. Besides, it is said to be the habit of the trade, to ascertain the number of bricks furnished for a building, after it is completed, and, then, to make the final charge. If so, I should think the Act satisfied by the insertion of that date."[1]

In a still later case, the same judge who gave the opinion of the Court in Witman *v.* Walker, and in

[1] 10 B. 186.

Knabb's Appeal, pursuing, still further, the more lenient views of the latter case, held a claim good, where the bill annexed was in the following form: "to 16,836 bricks, at $3,94 per 1000, the last of which were furnished June 3, 1847, $65,99." Those who desire to examine the lapses of the court from its original position, will not object to the space taken by the remarks, in this decision, upon this subject. The court say: "Certainty to a common intent is all that is called for, and this is satisfied, if those interested may ascertain the period during which the delivery of the materials was effected, or the work was done, so as to individuate the transaction. In the case last cited, where, as here, the claim was for bricks furnished in the construction of a building, but a single date was given, and this was ruled to be sufficient; more especially, as among brickmakers, the habit is said to be, to make the final charge, after all the necessary bricks are furnished. In the instance before us, it appears to me, the claim filed is still more precise and satisfactory, in the particular under consideration. The date upon which the last delivery of bricks took place, is given, to wit; June 3d, 1847, and it is averred the whole number was furnished within six months prior to November 6th, 1847, the date of the claim filed. It results, necessarily, that the materials here sued for must have been furnished between the 6th of May and the 3d of June, 1847. Now, surely, under the authorities I have referred to, this is sufficiently certain; and, particularly, when it is recollected, those who provide bricks for structures in process of erection, do not, ge-

nerally, charge each load despatched to the building, with the date when it was sent. It has been more than once said, we must not be hypercritical, when scanning this species of lien, and estimating its sufficiency. Such a practice must, necessarily, defeat a very large majority of them; a result not to be desired, where they furnish sufficient *data* to enable the parties subject to them, to ascertain all that is essential for them to know. Both upon authority and principle, then, we conceive the claim in dispute, here, well enough ascertains the time of delivery."[1]

There is a class of cases the doctrine of which is of modern growth, but which, perhaps, do not so directly conflict with the earlier decisions. They are cases in which the claimant has been allowed to state that the work had been done, or materials furnished, between two specified days, sometimes separated from each other by a long interval.

In cases of a contract, for the doing work or furnishing materials, in gross, these decisions might be sustained. But, where the work was done, or materials furnished, without contract, it would appear as if the usual words "within six months last past," were as satisfactory as the two dates which have been held sufficient.

In Richabaugh *v.* Dugan, a claim for "painting done in and about the erection and construction of the said building, and the necessary materials provided

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[1] Calhoun *v.* Mahon, 2 H. 58. See, also, Donahoo *v.* Scott, 2 J. 47.

therefor, from the 1st of April, 1842, to the 1st of October, 1842, and within six months last past," was held sufficient. And similar claims have been sustained in other instances.[1]

If these cases are, still, of authority, it would seem proper, at least, since the Act of April 16th, 1845, that, wherever the first of the two dates fixed is more than six months prior to the time of filing the claim, the claim should set forth, that the work was done, or the materials furnished "continuously," during the periods mentioned.

The Act of March 24th, 1849, should, also, be remembered in this connexion, which, after allowing both work and materials to be included in the same claim, further enacts, that "where the value or amount of the work or materials can only be ascertained by measurement, when done, or shall be done by contract, for a stipulated sum, it shall be lawful to file a statement of the time when the work was commenced, and when finished, and of the aggregate price of the work and materials." This Act applies, only, to the city and county of Philadelphia, and the county of Chester.

In a case in which a wrong date, which was, in fact, an impossible date, was, by mistake, inserted in the bill accompanying the claim, the court held, that it might be sustained if parol proof were given of the correct date.[2]

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[1] 7 B. 394. Bayer *v.* Reeside, 2 H. 167. Hill *v.* M'Dowell, 2 H. 175. Driesbach *v.* Keller, 2 B. 77.

[2] Hillary *v.* Pollock, 1 H. 186.

The sufficiency of the claim, however, with respect to the question, whether the "amount or sum claimed to be due, and the nature or kind of the work done, or the kind and amount of materials furnished, and the names," &c., are properly set forth, has been complicated with another question, namely, whether there has been a special contract or not.

In Jones *v.* Shawan, it was objected, that it was a claim for both work and materials, and that, though it appeared by the claim, that the work was not finished till within six months before the claim was filed, yet it did not therein appear, that the materials were furnished within that time. The court sustain the claim, however, and say: "But the plaintiffs by one contract agreed to furnish materials and do the work; and, if you believe the witnesses, the very last things done, were hanging doors, putting on hinges and locks, &c.; so that the furnishing materials was contemporaneous with doing the work, and was not ended till the completion of the work."[1]

In a subsequent case, the claim stated, that the contract for the workmanship of the building was made between the parties "on or about the 16th of April, 1841, at Tobehanna Township, Monroe county, aforesaid; and said work and labour were done between the said 16th of April, 1841, and the 29th of August, 1841." It was held sufficient.[2]

In a case of the Court of Common Pleas of Lancaster county, it is said; "An objection has been taken to

[1] 4 W. & S. 259. [2] Driesbach *v.* Keller, 2 B. 77.

the lien claimed by Israel Cooper," for work done and lumber furnished, 'per agreement.' The first inclination of the Court was, that the lumber furnished and the carpenter's work done, for a house, could not be intended to have been furnished and performed, in *one day*, the day on which the claim is dated. But, on further reflection, it seems to the court, that where the articles are furnished and work done for a building, in pursuance of an agreement to furnish all the lumber and perform all the carpenter work for a building, the lien cannot, properly, be filed, until the claimant is in a situation to maintain an action, or, at least, until he is in a condition to aver entire performance of his agreement. That is, where he has done all the work and furnished all the materials required by the contract. The limitation of six months would not begin to run until that time. The claim may be dated and filed on the day the contract is executed by the claimant. The claim may, therefore, in this instance, be considered as stating, that the work was done and materials furnished on the day it bears date, to wit, the 26th February, 1841."[1]

In a still later case, the court say, upon this subject: "Here the contract was to do all the work, and finish and complete four frame houses, which were very minutely described, in the contract. A mechanic who makes such a contract, and completes it, seldom keeps an account of every portion of the materials he uses, or the work he does; nor is there any occasion

[1] Shaffer *v.* Hull, 3 Pa. L. J. 321.

for it. He is to complete the houses according to his contract, and he is to be paid a stipulated sum. In this case, it is of no consequence, either to the owner or the public, that he should state the number of cubic yards dug for the cellar, the number of perches of stone built, or the quantity of boards used. He states what is equally useful, under the words of the Act, his contract. We see no valid objection to this lien, looking to the explanatory Act of the legislature."[1]

We ought to mention, in this connexion, the case of Ellice *v.* Paul, in the District Court for the city and county of Philadelphia, in which the work and materials were alleged to have been done and furnished by contract, and the only mention of time was in the words, "within six months last past," there being no date, except the date at the foot of the claim, under the name of the attorney. This date was December 2d; the claim was filed December 9th. The court held the claim defective, because the Act required the claim to be *filed* within six months after the work was done, or materials furnished; while the claim in question did not show, that they had been done or furnished, within six months from the time of filing, but only within that period from the date under the attorney's name.[2]

It has been held, that, where there is a special contract, it need not be referred to, expressly, in the claim.[3]

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[1] Young *v.* Lyman, 9 B. 450. See, also, Stiles *v.* Leaming, 7 Leg. Int. 19. Haines *v.* Burr, id. 54.

[2] 13 Leg. Int. 124.

[3] O'Brien *v.* Logan, 9 B. 99.

The next point to be considered, is the meaning of the clause, "The locality of the building, and the size and number of the stories of the same, or such other matter of description as shall be sufficient to identify the same."

In regard to the description of the building, the courts have been very indulgent. That the looseness allowed, in this respect, has been wise, with reference to purchasers and lien creditors, is, by no means, certain.

In Witman *v.* Walker, the court, in speaking of the last words of the clause just mentioned, consider them as giving a latitude, in this part of the claim, which was not conceded to the other statements which were required.

It has never been held, that a description of the premises by feet and inches, boundaries and extent, was necessary. It would, however, be much better, that this should be found in the claim, when certainty can be reached. In cases in which a party has availed himself of the mode pointed out by the Act of 1836, for designating boundaries, there can be no difficulty or danger. Nor is it probable, that there will be, in other cases. If the claim includes too little, indeed, the lien will be confined to the description.[1] But if it includes too much it would be sustained, no doubt, to the extent that is proper.

In the city there will be less danger, than in the country, in hazarding an opinion, in regard to the ex-

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[1] M'Donald *v.* Lindall, 3 R. 493.

tent of the ground, which the lien affects. But care should always be had, that no less is included than will be necessary. The only aid we can give will be found in the cases which we have heretofore referred to, under another head.[1] If no objection be made, a judgment may, perhaps, conclude the parties, in this respect, which will, of course, not be the case, where there is no description. If objection be made, it would seem, that a jury is the proper tribunal to decide the question.[2]

In respect to the "locality of the building," extreme indulgence has been extended to this class of creditors.

In Harker *v.* Conrad, a claim filed against "a three storied brick house, situate on the south side of Walnut street, between Eleventh and Twelfth streets, in the city of Philadelphia," was held to be sufficient, though Quince street intervened, between Eleventh and Twelfth streets.[3]

In another case, a claim filed against premises "on the west side of 13th street, between Vine and James streets, was sustained, though there, also, a third street intervened.[4] In another, a description of premises, "as on the north side of Lombard street, west of Ninth street, adjoining Stephen Smith's lot, on the East," was declared to be specific enough.[5]

In all these cases, however, the court required the name of the owner to be mentioned in the claim, and

[1] See *ante*, p. 135, *et seq.*
[2] Keppel *v.* Jackson, 3 W. & S. 320.
[3] 12 S. & R. 301.
[4] Springer *v.* Keyser, 6 Wh. 187.
[5] Shaw *v.* Barnes, 5 B. 20.

proof, upon the trial, that he owned no other premises within the description.

And in a case of a description somewhat similar, where the name of the owner was not mentioned, and there was no proof, that he owned no other property in the neighbourhood, the plaintiff failed to recover.[1]

These cases arose with reference to buildings within a city. But we are not without others, which tend to the same result, with reference to houses in the country.

In a case in the Court of Common Pleas of Lancaster county, a claim was sustained which described the premises as "in Dillersville, adjoining lands of Peter Hentz, and the Pennsylvania Rail Road."[2] In another case, in the Supreme Court, the claim was against premises "in Upper Providence Township, Montgomery county, Pennsylvania, belonging to Joseph M. Harper, bounded by land of Jacob Landis and others," and it was sustained.[3]

The same particularity in naming the owner, and in proving that he owned no other premises which could be mistaken for those intended, was required in these latter cases, as in those first referred to.

The reasons given in these opinions for the great latitude which they allow are, generally, the loose language of this part of the Act, the merits of the classes favoured by the law, and the sufficiency, in each case, of the description given, to prevent any one from being misled, by, at least, putting him on inquiry.

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[1] Hill's Est. 3 Pa. L. J. 323. [2] Shaffer *v.* Hull, 3 Pa. L. J. 321.
[3] Knabb's Ap. 10 B. 187.

But, even with all this tendency to license and indulgence, claims have been found insufficient, in this respect.

In Washburn *v.* Russell, the claim was against "a tract of land in Clarion county, on the waters of the Clarion river, with one double saw mill thereon, situate on the East side of said river." It was held to be fatally defective,—too vague to be helped by proof.

The Court say:—"Had the waters not been mentioned, the mill would have appeared to be simply on the East side of the river; and the case would have been more nearly assimilated to Harker *v.* Conrad, and Springer *v.* Keyser; yet it is difficult to say, that the description would have been certain enough, even then; though there had been no other double saw mill to which it could have been applied. The office of the description is to give notice to purchasers, and, perhaps, creditors, who are surely not expected to explore the course of a river, in order to discover, whether the particular property were intended. But this description is, in its actual form, much more vague. The waters of a river embrace a wide scope of territory; in this instance, the whole of the country; and the description is not more precise, than it would have been, had it contained no reference to the river or its tributaries. Would it be enough to state, that the building is in a particular county? Yet, in effect, no more was done, in this instance. It strikes us, at a glance, that such is not the description required by the statute." [1]

[1] 1 B. 499.

In some cases, also, where the description has not only been loose, but actually erroneous, the court has decided against the claim.

Where a house was described as "situate in Clinton street on the north side thereof, and 130 feet east of Eleventh street, containing in front on Clinton street 20 feet," and it, in fact, began at the distance of 116 feet east of Eleventh street, the claim was, indeed, held sufficient.[1]

But, in a later case, where an ejectment was brought for a house on the South side of Pine street, between Ninth and Tenth streets, and the plaintiff claimed under proceedings, under a mechanic's lien, against a house on the south side of Tenth street, below Pine, the court refused to hear proof, that they were, in fact, the same.[2]

With reference to the description of "the size and number of the stories," we get but little light from the cases.

In one of those to which we have just referred, the building was described as a "double saw mill," no mention being made of the number of stories. The court say: "A saw mill seldom, perhaps never, consists of more than one story, and it was, therefore, unnecessary to do more, in the way of description, by structure, than to advert to another circumstance as a substitute for the number of stories; by stating, that the mill was a double one."[3]

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[1] Ewing *v.* Barras, 4 W. & S. 468.

[2] Simpson *v.* Murray, 2 B. 76. [3] Washburn *v.* Russell, 1 B. 499.

In Shaw *v.* Barnes, the number of stories of a dwelling was omitted, but the claim was sustained.[1]

We find no cases in which the question has arisen, whether it is necessary to describe the building by its character or object, as a dwelling-house, a church, a barn, &c.

In Barclay's Appeal, a claim was filed against a building, with the "appurtenances." The court held it bad, and say:—"But an appurtenance may be a yard, an alley, a cistern, a conduit pipe, an ice-house, a smoke-house, a privy, a stable, or other out-house, distinct from the principal building mentioned in this written claim, and, consequently, not within the purview of the lien laws. It is incumbent on the mechanic or material man to bring himself within the statute, and to show title, affirmatively, on the face of the registry; and not for antagonist creditors to show the reverse."[2]

But, in a later case, in the District Court for the city and county of Philadelphia, the same word, "appurtenance," was used, but another part of the claim showed that it was an ice-house that was intended. And the court, without disturbing the doctrine of Barclay's Appeal, held, that though such a building might not, if it were distinct from the main building, be within the purview of the lien law, it would be if it were attached to and formed a part of the main building; and that proof might be given at the trial upon that point.[3]

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[1] 5 B. 20. [2] 1 H. 496.

[3] Killingworth *v.* Allen, 8 Leg. Int. 126. And see Odd Fellows' Hall *v.* Masser, 12 H. 510.

We have, in an earlier part of the volume, commented on these cases, in another of their aspects. We refer to them, in this connexion, as suggesting one reason, at least, why it may be best to state the nature of the building and its use.

In the case last referred to, it was held, in respect to the description of the building, as it had, before, been held, in reference to the statements as to the work and materials, that the body of the claim might be aided by a bill annexed. And, in a much earlier case, it seems to have been held, that a plan might be referred to, if it were filed.[1]

It has not been clearly decided, whether the claim must allege a credit to the building. It has been held, however, that it need not state, in the precise words of the Act, that the work was done or materials furnished, "for or about the erection or construction of the building."[2]

A claim signed by counsel was sustained, where authority was shown.[3]

A claim when filed, is not a record. It resembles, very much, in its character, the registry of a mortgage.[4] If it be defective, the filing of it does not exhaust or affect the lien, which exists, independently of it, until the six months have expired.[5] A second, third or fourth claim may be filed; and no prior one can be pleaded

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[1] M'Donald *v.* Lindall, 3 R. 493. [2] Kelly *v.* Brown, 8 H. 446.

[3] Donahoo *v.* Scott, 2 J. 45.

[4] Davis *v.* Church, 1 W. & S. 240. See Lauman's Ap. 8 B. 478.

[5] Bournonville *v.* Goodall, 10 B. 133. Chambers *v.* Yarnall, 3 H. 265.

against the last. In a late decision, the court say: "Nor, is there any thing in the suggestion, that the means of enforcing the lien given to mechanics and material men by the Act of 1836, are exhausted in an abortive attempt to pursue the directions of the statute, by filing the claim within six months. This is but the mode of giving it fruitful effect; and, should it fail, from some technical, or even substantial defect, the lien is no more destroyed, than would be a bond, sued out by an improper or inapplicable writ. The claim still remains, and so does the lien, until barred by the lapse of six months after the work finished or materials furnished. The mistake originated in confounding the lien, which derives its vitality altogether from the statute, independently of any recent entry, with the remedy, which, to be sure, must be commenced within the six months. But, within that period, it may be renewed as often as the exigencies of the claimant's case may demand. In this respect, it is precisely like an action by writ, always open to the party, until barred by the statute of limitations, or an adjudication upon merits. To hold otherwise, might be attended, not only, by inconvenience, but gross injustice,—a hazard which no analogy in the law calls upon us to encounter, and against which we are admonished, by the frequent failure of these recorded claims, upon merely formal grounds, or because of a want of the due observance of the statutory requisitions. A guard against the abuse of the right will be found in the costs attendant upon its exercise,

or, if malice be present, in the remedy afforded by the law in such cases."[1]

A claim cannot be amended. If the time for filing it has not expired, a second may be filed; but, if it has, there is no remedy.[2]

The danger of allowing an amendment is apparent. There would be no safety for purchasers or lien creditors. Misled by a false description or defective statement in a claim, to disregard it and spend money on the faith of a supposed freedom of property from incumbrance, they would be surprised by a sudden restoration of the lien.

We have already referred to the time within which the claim must be filed, in order to continue the lien.[3]

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[1] Bournonville *v.* Goodall, 10 B. 133.

[2] Hill *v.* M'Dowell, 7 Leg. Int. 179. Havilland *v.* Pratt, 9 id. 98.

[3] Ante, p. 181, *et seq.*

CHAPTER V.

OF JOINT, APPORTIONED CLAIMS.

THERE is a species of claim, of much importance, which has so many and such important peculiarities, that it is proper to treat it separately.

It was held, in one of the earlier cases, that, under the Act of 1808, a claim could not be filed against two adjoining houses, owned by different persons, for materials furnished to them indiscriminately. The court, however, expressly refrained from giving an opinion, as to a case in which the houses were all owned by one person.[1]

It appears, however, to have been decided by the District Court, for the city and county of Philadelphia, that a joint claim could not be filed, even where the houses were owned by the same person.[2]

In a subsequent case, however, the court held, that a claim for work done, and materials furnished, under a general request, and without any specific contract, might be filed against several houses jointly, when they were owned by the same person; or, that the claimant might apportion the amount among them,

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[1] Gorgas *v.* Douglas, 6 S. & R. 512. Thompson *v.* Ward, Wh. Dig. 5 Ed. pl. 151.

[2] Atkinson *v.* Graves, Wh. Dig. 5 Ed. pl. 143.

according to the value, or price of the materials or work, and file a separate claim against each. The court say:—"So, I, also, think, that, where the lumber merchant furnishes materials for, or the mechanic does work, in the construction of, two or more contiguous houses, belonging to the same person, under a general request, without any specific contract for each house, separately, that he may under the Acts of Assembly, either file his claim for the amount against all the houses jointly, or he may apportion it among them, according to the value or price of the materials furnished, or the work done to each; and file his claim, accordingly, against each house, separately, and thus, continue his lien, in either form.

"There being nothing, then, as I conceive, in the Acts of Assembly, which restrains the parties from including, in the same contract, materials for, and the work of as many contiguous houses as they please, it would seem to follow, that the nature and terms of it, together with the work done under it, ought to regulate the operation and extent of the lien. Hence, it would extend itself to all the houses or buildings, actually commenced, for which the materials were furnished, or work done, under the same contract, and would become a joint lien for the whole amount of the debt, commencing on each house with the commencement of the building thereof. This appears to be, not only, the most obvious as well as safe and certain rule or guide, by which the nature and the extent of the liens of material men and mechanics may be determined, but the best suited to give to those per-

sons that degree of security for the payment of their respective debts, which was intended by the legislature. In its operation and effect, it may be fairly likened to the lien of a mortgage given to secure the repayment of money borrowed, upon a number of different tracts of land, say, eighteen, in all, lying in as many different counties of the State. The lien under it would commence, and the whole amount of the debt become a charge upon each tract, from the date of the recording of the mortgage, in the county in which each tract was situated; and, as it would, scarcely, be practicable to have the mortgage recorded in any two of the counties, on the same day, the date of its lien, on each tract of land, would vary, accordingly; but, as soon as recorded, in all the counties, the mortgage debt would become a joint lien, upon all the eighteen tracts of land embraced in the mortgage. And if, in such case, afterwards, while other liens existed on the mortgaged lands, some of prior, some of even, and others of subsequent date to that of the mortgage lien, a judicial sale were to be made of all the lands, under a proceeding had upon the mortgage, for that purpose, and the moneys arising therefrom prove insufficient to pay off all the liens, the rule for appropriating it, in such case, according to seniority of lien, could not, well, be misapprehended, as it must be familiar to all."

"In further explanation of the principle here intended to be laid down, I would observe, that, in case of a joint lien, each house or building bound by it, is liable for the whole amount thereof; and where there are other liens of equal date, some joint, and others

several, as in the present case, all of equal date, the money arising from a judicial sale of all the houses, must be marshalled and appropriated in such manner, that the proceeds of no one of them shall be appropriated to the discharge of any subsequent lien, as long as any portion of a prior lien, either joint or several, upon the same house, remains unsatisfied."[1]

The Act of 1831 provided as follows:—"*And whereas*, it sometimes happens, that several houses and other buildings, adjoining each other, are erected by the same owner, so that it is impossible for the person who has found and provided materials for the same, to specify, in his claim filed, the particular house or other building for which the several items of his demand were so found and provided: *and, whereas*, doubts have arisen, as to the true construction, in such cases, of the laws of this Commonwealth: therefore,

"SECT. 4. It shall and may be lawful, in every such case, for the person so finding and providing materials, as aforesaid, for two or more adjoining houses, and other buildings built by the same person, owner of the same, and debtor for the said materials, to file, with his claim thereof, an apportionment of the amount of the same among the said houses and other buildings, and each of said houses and other buildings shall be subject to the payment of its said apportioned share of the debt contracted, in the same manner as is provided by law in other cases."

The Act of 1836 provides that:—"In every case, in

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[1] Pennock *v.* Hoover, 5 R. 313, 319.

which one claim for materials shall be filed by the person preferring the same against two or more buildings, owned by the same person, the person filing such joint claim shall, at the same time, designate the amount which he claims to be due to him, on each of such buildings, otherwise, such claim shall be postponed to other lien creditors; and the lien of such claimant shall not extend beyond the amount so designated, as against other creditors having liens by judgment, mortgage or otherwise."

With reference to this section, the Commissioners say:—"§ 14, alters somewhat the provision of section 4, of the Act of 1831, the preamble to which explains the necessity of the provision. The last part of that section, which says, that the several buildings shall be liable to the apportionment made by the claimant, has been omitted, because it seems objectionable, that the party should have a right, conclusively, to fix the liability of property which may be in the hands of a third person; though it is proper, that, having made an apportionment, he should be bound by it, as against other creditors or purchasers. It is believed to be best, to leave the correctness of the apportionment to be determined by the Court, or a jury, if the parties interested should dispute it."

It is, of course, proper, in these claims, to aver a joint ownership of the houses against which the claim is filed. Perhaps, in analogy to the decision, under other parts of the law, however, an omission to do this, might be supplied by proof at the trial.

It will be observed, that the provisions of this Act

apply only to a "claim for materials." And under it, in the District Court for the city and county of Philadelphia, it was held, that a claim for work cannot be apportioned.[1]

But in the case of Donahoo *v.* Scott, the Supreme Court decides the contrary. In that case a joint apportioned claim for work was sustained.[2]

It might be a question, whether those who do *work* for a block of buildings are left, as they were before the Act of 1836, with the privilege given them under the decision in Pennock *v.* Hoover, of filing, either a joint claim, or several apportioned claims; or whether the intention of the Act was to exclude them entirely. But how they could file the peculiar joint apportioned claim, given by the Act, only to material men, is not very clear. And, yet, the decision in Donahoo *v.* Scott, is, not only, a confident one, but expresses some impatience against the objection.

This subject, however, is set at rest, by an Act of April 25th, 1850, which enacts:—"That the several laws of this commonwealth authorizing an apportionment of the amount due for materials furnished to two or more buildings owned by the same persons, among the said buildings, shall extend to and shall authorize, in similar cases, an apportionment for work done, and for work done and materials furnished, where the same are furnished under one contract, as fully, and in the same manner, as is now authorized and allowed, in the case of materials furnished."

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[1] M'Namee *v.* Stoever, Wh. Dig. 5 Ed. pl. 154. [2] 2 J. 45.

It was decided at an early day, as we have already seen, that a joint claim could not be filed against adjoining buildings owned by different persons.[1]

In a late case, in the District Court for the city and county of Philadelphia, distinct claims were filed against each of several adjoining houses, for apportioned sums, making, in the aggregate, the price of materials furnished to all of them, indiscriminately, upon the order of the same person, who was contractor for the whole block. The court struck them off, on motion, saying:—"It appears that the bills were contracted with different persons, and the materials furnished on the credit, not of the particular building, but of that and another building, owned by another person, the contractor being the same. We have already decided, that, in such cases, a general claim cannot be filed, nor can a separate claim; for it is clear, that materials were furnished, indiscriminately; and separate claims will not be supported, as the *allegata* and *probata* would not agree. The plaintiff must show that the particular materials were furnished to the particular buildings."

In the subsequent case of Davis *v.* Farr, the same court made a similar decision. But the Supreme Court reversed their judgment, and reinstated the liens which had been stricken off. Burnside, J., in delivering the opinion of the court, says, with reference to the Act of 1836: "The spirit and object of the Act are, that each house should pay for its own

[1] *Ante*, p. 249.

lumber; and, when the contractor is erecting two houses for different persons, unless the material man can divide his bill which is purchased by the contractor, and file a lien for a proper portion to such building, the first section of the Act is defeated. The proceeding is *in rem*, and I am unable to discover any good reason why this should not be done. '*Every building*,' by the act, '*is subject to a lien, for the payment of all debts contracted for work done, or materials furnished.*' The only argument of weight against such a course is, that the lien may be filed against one of the buildings, for an improper proportion; but this can be adjusted by the jury, on a trial on the *scire facias*, under the direction of the court."[1]

In cases which were clearly within the Act of 1836, as to apportionment, in respect of the nature of the debt and the ownership, the question has arisen, what houses are within the provision. The statute speaks of two or more buildings; but it has been settled, that they must be adjoining houses; or, in other words, constitute one block.

In Pennock *v.* Hoover, the question appears to have been presented, whether a joint claim could be filed, where the houses did not adjoin each other, and it was left undecided.[2] But, in Chambers *v.* Young, it was distinctly held, that a joint, apportioned claim against thirty-two houses, of which eight adjoined each other, on one street, twelve, on another street, and the remaining twelve, on a third

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[1] 1 H. 170. [2] 5 R. 292.

street, constituting three distinct blocks, not adjoining each other, could not be sustained. Gibson, Ch. J., delivering the opinion of the court, says: "The claim first filed, embracing, as it did, the block of houses on Carlton street, as well as the block on Callowhill street, was not sustained by any statute or precedent construction; and the claimant might file a second time, as if it had not existed. The principle ruled in Pennock *v.* Hoover, that a joint lien might be filed against adjoining houses, put up together, because it might not be in the power of the claimant to discriminate, was the basis of the thirteenth section of the Act of 1836, which sanctioned it, and provided for carrying it out, by an apportionment of the general charge. The word 'building' used in every Act upon the subject, was, strictly, applicable to a block, which, though composed of separate houses, was put up as a whole; but it could not be predicated of separate blocks, in different streets, which could, in no aspect, be viewed as entire. As a charge for labour or materials furnished to the builder of a particular block, could not be apportioned, with certainty and convenience, in the first instance, necessity required it to be joint; but it is easy to discriminate between separate blocks, in regard to which no such necessity can exist. A joint claim against them would require an apportionment, in the first place, between the blocks themselves, as integers, and in the second, an apportionment, respectively, among the houses composing them, a proceeding not war-

ranted by the Act of 1836. The claim first filed was, consequently, a nullity, and properly disposed of."[1]

But, in a still later case, a joint claim was filed against thirty-two houses erected by one owner, of which, sixteen fronted on one street, and a like number on another street, parallel with the first, the yards adjoining in the rear. The court held the claim to be good, because "the buildings were put up by the owner, at one time, and on one lot, and the materials were furnished for them all jointly."[2]

In a case decided some time before the one last noticed, a question of some novelty and interest arose. A claim was filed against a two-storied dwelling-house, Swiss barn, wagon-shed, wood-house, and wash-house, smoke-house and ice-house on a farm. To this claim it was objected, that it ought to have been apportioned. It was held, however, that no apportionment was necessary. Bell, J., delivering the opinion of the court, says: "But the reason of the enactment shows it was intended to apply only, to the case of separate and distinct erections, capable of and intended for a distinct possession and enjoyment. Looking to the mischief to be remedied, it is very obvious, the statute has no reference, whatever, to the necessary buildings of a farm forming component parts of a common property, and which, for every beneficial purpose, must be occupied as one possession. The dwelling-house, barn, wagon-house, and other similar erections are but appendages of the farm, the principal thing, and built, expressly, with a view

[1] 3 H. 265. See Campbell *v.* Furness, Wh. Dig. Sup. to 5 Ed. pl. 42.

[2] Taylor *v.* Montgomery, 8 H. 445.

to its more perfect enjoyment. They are, therefore, to be considered as constituent parts of a whole, incapable of separation, without injury; and, consequently were intended for a several occupation.

"Such buildings are, in every particular, unlike those which, though, apparently, joined, are, in fact, completely divided, each, of itself, constituting an object of distinct proprietorship and incumbrance. The one is aggregate; the other is segregate. The propriety of apportionment among the latter, is manifest; its uselessness, as applied to the former, is not less so. For the reasons given, it is apparent, a case like the present was not within the contemplation of the framers of the law. Though the language used, taken literally, may include it, yet, being without the circle of the mischief to be cured, it is, clearly, not embraced by the spirit of the Act. It, consequently, remains subject only to the prior statutes, which do not, imperatively, call for an apportionment."[1]

It would, of course, be better, in all these claims, to aver a joint ownership, and the character of the buildings, as adjoining each other, or constituting a single block.

The question has not yet arisen, what would be the effect of a change of the ownership of one of the houses, after the work was done. The rights of the creditor ought not to be affected by such a fact.

Of the effect of a failure to apportion, in postponing the claimant, we have spoken under another head.[2]

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[1] Lauman's Ap. 8 B. 473.

[2] Ante, p. 185.

CHAPTER VI.

OF STRIKING OFF CLAIMS.

If a claim be defective, a mode of getting rid of it is, to move to strike it off.[1] Of course, the motion will not prevail, unless the defect is one which is, necessarily, fatal, and cannot be aided or supplied by proof upon the trial. Many questions, as to the validity of liens, have been heard and decided upon motions of this kind.

In Lehman *v.* Thomas, a petition was filed, as the basis of the motion, and, upon it, a rule to show cause was granted.[2] This, perhaps, is the more regular course.

In the same case one of the parties demurred to the claim, and his demurrer was sustained. The usual mode, however, adopted in practice, is the motion.

It would seem, from some of the cases, that this prompt effort to dispose of the lien meets with favour from the courts, as it may save the expense of a trial. Defects that will avoid a claim upon such a motion, have been disregarded, after a trial upon the merits.[3]

In Bayer *v.* Reeside, Burnside, J., says: "We allow

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[1] Lehman *v.* Thomas, 5 W. & S. 263. [2] Ibid.

[3] Shaw *v.* Barnes, 5 B. 21. Bayer *v.* Reeside, 2 H. 168.

a claim which is defective, in form, to be stricken off on motion and rule, from the record; but, after a trial on the merits, technical objections are disregarded by the court." [1]

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[1] 2 H. 168.

CHAPTER VII.

OF THE SCIRE FACIAS AND ITS SERVICE.

We have already spoken of the provision, in the Acts of 1803 and 1806, for an action for the recovery of the debt, based upon or collateral to the claim, and of the difficulties that arose, in regard to the character of this action and its relation to the claim.

The Act of 1808 was the first that made mention of the *scire facias*. It enacted, that the creditor, "having a claim filed," might, "at his election, proceed to recover it, by personal action, according to the nature of the demand, against the debtor, his executors or administrators, or by *scire facias* against the debtor and owner of the building, or their executors, or administrators."

From the early cases it would appear, that this was a *scire facias* issued, as now, upon the claim filed.[1]

The Act of 1836 expressly declares, that the proceeding to recover the amount of any claim shall be by a writ of *scire facias*, and gives the form of a writ. We know of no other mode, at present, of suing out the claim.

Where there is an apportioned claim, there must be

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[1] Howard *v.* M'Kowen, 2 Br. 150.

a *scire facias* against each separate house, for the sum apportioned to it. This appears to have been the construction both of the Act of 1831, and that of 1836.[1]

It appears, from the decision in Hampton *v.* Broom, that the *scire facias*, under the Act of 1808, might name the owner and make him a party to the proceeding, though he had not been mentioned in the claim. That was a case in which a *scire facias* was issued against one person, as owner, upon the trial of which the plaintiff was defeated, and having issued a second *scire facias*, upon the same claim, against another person as owner, the judgment, in the first *scire facias*, was pleaded against him, as a former recovery; but the court held, that the first *scire facias*, being between other parties, the judgment on it was not a defence. Of course, the two proceedings could not have been had, if the owner had been named in the claim and the *scire facias* had, necessarily, pursued it.[2]

But, under the later Act, this license cannot, as we have before shown, be allowed. It has, indeed, been held, that a *scire facias* upon a claim against a firm, by its firm name, may, for the first time, state the individual names of the partners.[3] But no greater latitude than this seems to have been allowed. In a late case, where a mistake had been made in the *scire facias*, by the omission of a proper party, the court refused to allow an amendment making him a party.[4]

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[1] Barnes *v.* Wright, 2 Wh. 198. Jones *v.* Shawan, 4 W. & S. 264.
[2] 1 M. 241.
[3] Black's Ap. 2 W. & S. 181.
[4] Noll *v.* Swineford, 6 B. 187.

Where a *scire facias* has been discontinued, or the plaintiff has been nonsuited, he may issue a new writ, upon the same claim.[1]

The Act of 1808 pointed out the mode in which a *scire facias* was to be served. But it is only important, here, to refer to that required by the Act of 1836, which enacts, that "the writ of *scire facias*, aforesaid, shall be served, in the same manner as a summons, upon the defendant therein named, if he can be found within the county, and a copy thereof shall be, also, left with some person residing in the building, if occupied as a place of residence; but, if not so occupied, it shall be the duty of the sheriff to affix a copy of such writ upon the door or other front part of such building."

The 18th section of the Act of 1836, required an advertisement, but this provision was repealed by an Act of 1842.

The Commissioners, in their report, say, upon this subject,—"These sections have been introduced for the purpose of giving some additional notice to third persons interested, of the proceedings upon a claim. The provisions of the existing law seem to be sufficient, as respects the owner of the property with whom, or on whose account, the contract was made; but they are strikingly deficient with respect to third persons, such as purchasers, mortgagees, judgment creditors, and *other mechanics* and *material men*, since they provide no kind of notice to them, while they may be

[1] Bolton *v.* Johns, 5 B. 145. Hampton *v.* Broom, 1 M. 246.

greatly prejudiced by the proceeding. Frequently, the owner of property is insolvent, and indisposed to contest the amount of a claim. Sometimes, he may collude with the claimant, and a judgment may, thus, be obtained, on a *scire facias*, to a much greater amount, than the justice of the case would warrant; whereas, if the lien creditors had notice, they might have come in and disputed the amount.

"But how is notice to be given to them? Ought they to be made parties to the suit, as is required in chancery, in England, or served with a rule to appear and take defence, if they see proper? The objection to this is, that it imposes on the claimant great expense and inconvenience, in making search for all these persons, whom it will be necessary to trace through the various offices, especially in the case of mortgages, which must be searched for against all persons who have previously held the property; and, even after all pains taken, some persons interested might remain undiscovered. The expense, too, of serving writs and notices upon those who were ascertained to be interested, would be very great. The least expensive, and, in some respects, the most certain mode, seems to be that of public advertisement, which is adopted in many other cases. The provision we have added in the eighteenth section, that a copy of the *scire facias* shall, in all cases, be left at the building or affixed thereto, will come in aid of the other means of notice. To give an opportunity of advertising, for a sufficient length of time, it is necessary, that there should be an interval of at least fifteen *days*, between the issuing

and return of the writ, which is the object of the seventeenth section."

In Donahoo *v.* Scott, a return, "served by copy, on A., one of the defendants, and by putting up a copy in front of the building, and *nihil* as to B., the other defendant," was held sufficient.[1]

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[1] 2 J. 45.

CHAPTER VIII.

OF COMPELLING THE CLAIMANT TO PROCEED.

It often happens, that a creditor, after filing his claim, lets it lie, satisfied with his security, or, supposing, that the mere embarrassment which it occasions, as an incumbrance, may lead to its payment. If the claim were valid, and could not be stricken off, there appears to have been no remedy for the owner, prior to the Act of which we are about to speak, which was directed to this very hardship.

The 23d section of the Act of 1836 enacts, that, "In every case in which any claim shall be filed against any building as aforesaid, and no *scire facias* shall have issued thereon, it shall be lawful for the owner of such building, or any person interested therein, to apply by petition, to the court in which such claim shall be filed, setting forth the facts; whereupon, such court may grant a rule upon the party claimant, and others interested, to appear, in court, at a time to be fixed, for such purpose, and, on the return of such rule, may proceed, in like manner, as if a *scire facias* had been issued by such claimant, and had been duly served and returned."

Two cases, in the District Court of Philadelphia, are the only ones of which we know, directing the course of practice under this section.

In that of Borton *v.* Morris, the defendant filed his petition, under this section, whereupon, the court made an order as follows, with the intimation, that a like order would be made in future cases: "That, in each of these cases, the plaintiff shall file a statement or declaration, upon the contract under which the said work was done, stating the same, particularly; if any special contract were made, annexing thereto, as a part thereof, a bill of the items or particulars of the demand, as fully as they appear upon the plaintiff's book of entries, if any such are intended to be offered in evidence, on the trial; and, if no such entries are to be offered, then the said bill shall state, particularly, the dates or times at which said work and labour were performed. And the court further direct, that the defendant allege, particularly, his defence to such parts of the plaintiff's statement, or to such item of his bill of particulars, specifying the same, as he intends to dispute; and neither party shall be allowed, on the trial, to allege or prove any matter or thing not contained in the statement, or bill of particulars, exception, or defence. The plaintiff to comply with this order on or before the 7th day of June, 1837, or, in default thereof, judgment of *non. pros.* to be entered, in each case, and the claims to be stricken from the record."[1]

In Walter *v.* Streeper, it was held, that, after an issue had been joined under this section, the claimant could not suffer a non-suit. The court say:—"Now,

[1] 2 M. 109.

if, after the owner has called on the claimant to proceed, who does so, the claimant, at the trial, may suffer a non-suit, the whole purpose of the law would be defeated; for it would compel the defendant, again, to call on the claimant to proceed, who, on another trial, might, again, suffer a non-suit, and, so, the case would never be ended."[1]

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[1] Id. 348.

CHAPTER IX.

OF COMING IN BY SUGGESTION.

The 19th and 20th sections of the Act of 1836 are as follows:—"Sect. 19. Upon the return of such writ, it shall be lawful for any other person, having filed a claim as aforesaid, to cause to be entered on the record of the same suit, a suggestion, setting forth the amount and nature of his demand, and, thereupon, he may have a rule upon the defendant to appear and plead thereto, as in other actions.

"Sect. 20. If the defendant shall appear and plead to such suggestion, and issue, either in fact or law, be joined, upon any plea, such particular issue shall be tried and determined, as in other cases: if the defendant shall not plead to such suggestion, after due notice, judgment shall be entered for the claimant filing the same, and the amount of the claim shall be ascertained as in other cases."

The Commissioners, in their report, say: "These sections are intended to provide a method by which other lien creditors may come in and avail themselves of the opportunity of the suit commenced, without the delay and expense of issuing successive writs of *scire facias*. This mode of proceeding is not without precedent, even in our own jurisprudence."

In a case in the District Court of Philadelphia, a suggestion was filed, under these sections, and a rule taken upon the defendant to plead.[1]

The 3d section of the Act of April 14th, 1855, contains the provision: "That every claimant, having a claim filed for work or materials, or both, who shall, afterwards, proceed to perform further work, or furnish other materials, or both, may make suggestion thereof, on the same record, and filing a statement of the amount and particulars thereof, which may be recovered, with the original claim, under the writ; but if the original claim shall have been sued out, then, a separate *scire facias* may be issued for the supplemental claim."

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[1] Noyes *v.* Fritz, 2 M. 162.

CHAPTER X.

OF THE JUDGMENT FOR WANT OF AN AFFIDAVIT OF DEFENCE.

By the Act of March 28th, 1835, judgments, for want of an affidavit of defence, were allowed to be entered "on liens of mechanics and material men, under the Act of 17th of March, 1806," in the District Court for the city and county of Philadelphia.

By an Act of March 12th, 1842, it was enacted as follows:—"The 2nd section of the Act to which this Act is a supplement, shall be construed to embrace actions of *scire facias* on liens of mechanics and material men, under the Act of the 16th of June, 1836, entitled 'an Act relating to the lien of mechanics and others, upon buildings,' and under any other Act extending the provisions of the said last mentioned Act; and all former proceedings in said Courts, so far as they are founded on such construction, are hereby confirmed."

And, by an Act of March 11th, 1836, it is provided, that, "In all actions which have been or shall be brought in the said Court, upon any record remaining therein, it shall not be deemed or held to have been, or to be necessary for the plaintiff, to file, in the office of the prothonotary of the said Court, a copy of such record, to entitle him to enter a judgment under the

2nd section of the Act to which this is a supplement: *Provided*, he shall have complied with the other requisitions of the said Act."

Under these Acts, the practice is constant, to take judgments, under writs of *scire facias*, upon claims, for want of an affidavit of defence, without filing any copy.

In Richards *v.* Reed, the court refused to give judgment for want of an affidavit of defence, where the contractor was dead, and his administrator was sued.[1]

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[1] 8 Leg. Int. 126.

CHAPTER XI.

OF THE PLEADINGS.

Where no judgment is entered, for want of an affidavit of defence, the parties proceed to issue as in other cases.

The *scire facias* is a sufficient declaration. No other need be filed.[1] The first step, therefore, in the technical pleading, is the plea.

When the claim and *scire facias* only named one of two contractors, the court held, that it was matter of abatement, and ought to have been so pleaded.[2]

Where a claim is defective on its face, and no motion to strike it off has been made, it appears that a demurrer is not irregular.[3]

A plea of "no lien," has, it appears, been filed, in some of the cases.[4] But it has been expressly held to be bad. In a late case, the court refused to treat it as anything but a general demurrer. But the judge

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[1] Ridgway *v.* Hess, 1 Br. 347.

[2] Richabaugh *v.* Dugan, 7 B. 394. But see Howard *v.* M'Kowen, 2 Br. 150.

[3] Bartlett *v.* Kingan, 7 H. 341. Bayer *v.* Reeside, 2 H. 167. Lehman *v.* Thomas, 5 W. & S. 262. M'Dowell *v.* Hill, 7 Leg. Int. 179.

[4] Johns *v.* Bolton, 2 J. 339. M'Dowell *v.* Hill, 7 Leg. Int. 179. 2 H. 175.

takes occasion to say:—"Indeed, it is so entirely uncertain, in its short form, whether it means to raise an issue in fact, or of law, that it should not be allowed, and should be stricken off on motion."

These, as far as we can find, have been the pleas by which the parties have endeavoured to avail themselves of defects on the face of the claim. We may refer, however, in this connexion to an instance in which a plea was as follows:—"The claim is null and void, because it does not state the kind and amount of materials, and the times when furnished, and this he is ready to verify by the record," was stricken off by the court on motion.[1]

The registry of a mechanic's claim, being no record, a plea of "*nul tiel record*," is a nullity. In a case where such a plea was filed, the court say:—"Had there been a variance between the registry and the *scire facias*, the defendant might, perhaps, have demurred."[2]

In regard to the pleading, in this action, Lowrie, J., in the District Court of Allegheny county, says, in one of the later cases: "I know of no proper pleas, in this anomalous form of action, except such as distinctly state the facts upon which the defendant relies for his defence, or such as deny the allegations which he requires the plaintiff to prove. He may traverse the allegation of the doing of the work, or furnishing of the materials, or that the work or materials, or both,

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[1] Christine *v.* Manderson, 2 B. 363.

[2] Davis *v.* Church, 1 W. & S. 240.

amount to so much; or plead, that the house is misdescribed, or that the work was not done, within six months, or he may set up payment, release, or other matter in evidence."[1]

The ordinary pleas in bar to the *scire facias*, are the short pleas, "*non assumpsit*," "payment," "set-off," with leave.[2] In one case, we find, that, even a terre tenant who came in to defend, upon notice of the *scire facias*, pleaded "*non assumpsit* and payment, with leave, &c."[3]

It is evident, however, that the plea of *non assumpsit* is not proper where the basis of the claim is not a simple contract debt, but an agreement under seal.

We find no cases showing, what may be given in evidence, under this plea, when it is proper. It is probable, that many of the defences that would avail the defendant should be specially pleaded. Such a course is accompanied, only, with the peril attendant upon the form of every special plea. There is no doubt that a special plea is good, though the evidence proper to sustain it may be admissible under the general issue.

We find numerous instances, therefore, of special pleas. Many of them are directed to the defects of the claim, not appearing on its face, but arising from matters *dehors*, and connected with technical theories governing the proceeding.

Thus we find in one case, a plea of, "claim not filed

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[1] M'Dowell *v.* Hill, 7 Leg. Int. 179.

[2] See Chambers *v.* Yarnall, 3 H. 266. Ewing *v.* Barras, 4 W. & S. 467.

[3] Hopkins *v.* Conrad, 2 R. 316; and see Johns *v.* Bolton, 2 J. 341.

within six months," to which no objection appears to have been made.[1]

In another case, we find a plea sustained, averring, that the premises against which the claim was filed had been sold under judicial process, and the lien thus discharged.[2]

We find it pleaded, in another case, that the work was not done, nor the materials furnished, on the credit of the building.[3]

So a plea, that, the person named as owner is not owner, though not, it appears, a good plea, for the contractor, is proper for the person named as owner.

A defence founded upon a special contract, must be pleaded. For the plaintiff is not bound to refer to or mention it.[4]

In Haworth *v.* Wallace, the defendant pleaded, that the reputed owner had, at the commencement of the building, and at the time of pleading, only a lease-hold interest.[5]

In the case of Campbell *v.* Scaife, in the District Court of Allegheny county, a plea that "the plaintiffs never had any claim against the said house, in manner and form as set forth," was held bad, because it was a mere denial of a legal conclusion.[6]

In the same case, a plea that the debt claimed ought not to be levied, &c., because the plaintiffs, at the time of furnishing the materials, agreed to allow a credit of

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[1] Driesbach *v.* Keller, 2 B. 77. Bayer *v.* Reeside, 2 H. 167.
[2] Johns *v.* Bolton, 2 J. 339. [3] Gable *v.* Parry, 1 H. 181.
[4] O'Brien *v.* Logan, 9 B. 97. See Haly *v.* Prosser, 8 W. & S. 133.
[5] 2 H. 118. [6] 8 Leg. Int. 74.

four months on the same, which period had not elapsed, concluding with a verification, was held bad on demurrer, because it merely showed, if true, that the *scire facias* had issued prematurely, and, not, that there was no lien, and the prayer should, therefore, have been, that the writ should be quashed.

And a plea, that the debt claimed ought not to be levied of said house, because the plaintiffs were subcontractors, under one I. M., impleaded with the owners, who had undertaken to erect said house for the owners, and to furnish the materials, and to receive payment therefor, partly in merchandise, and partly in money, in one, two and three years after the completion of the building; concluding with an averment of readiness, and with a verification, was held bad on demurrer.

The effect of the plea of payment is not peculiar in this action. Evidence may be given of payment in goods. But no advantage can be taken of any defect in the claim, or in the filing of it. The plea admits the truth of the averment in the writ.[1]

It has been held that the contractor may plead a set-off.[2]

Another claim filed for the same debt is not a good plea.[3]

But a judgment for the defendant, in a personal action, for the same debt, is a good plea.

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[1] Richabaugh *v.* Dugan, 7 B. 394. Lewis *v.* Morgan, 11 S. & R. 235.

[2] Gable *v.* Parry, 1 H. 181. [3] Bournonville *v.* Goodall, 10 B. 133.

CHAPTER XII.

OF THE EVIDENCE.

Upon the trial, the plaintiff in the *scire facias*, must prove the case upon which he relies, unless he is relieved from it, by a plea which assumes the affirmative of the issue.

In presenting the points which have been decided upon the subject of the evidence, in these proceedings, we shall take the different steps of the plaintiff's case, in such order as we may suppose them to be proved upon the trial.

Early steps in the proof would, properly, be the facts of the erection and construction, and the character of the building to bring it within the Act.

The time of its commencement need not be proved. The judgment is irrespective of that, and does not find it, or conclude any party with reference to it. When rendered, it is left to struggle with other liens for priority, and to have the date of its relation back established, when a case arises in which it becomes important. It is not made a question upon the trial of the *scire facias*.

The names and characters of the parties should be shown,—their relative positions, as owner and contractor, and the title of the former, to the premises

against which the claim is filed. For, if his interest be, merely, of a lease-hold character, there can be no recovery. But the jury does not, where there is a recovery, find the character of the estate which is affected, nor does the verdict conclude that question.

It would seem from the views of the Court which decided the case of Campbell *v.* Scaife, that, the claimant must, also, show the contract of the chief contractor with the owner.[1] We have, already, suggested, however, that the practice is not in accordance with this opinion.

The debt must be proved,—the doing of the work and the furnishing of the materials. As to the mode of proving these there is, perhaps, no rule peculiar to this system. The claim, itself, is, of course, not evidence for the claimant,[2] though it may, it appears, go out with the jury.[3]

Where there is no special contract, those facts are frequently proved by books of original entry in the usual manner. Where there is such a contract, by the contract, itself, and testimony showing performance.

It has been made a question, how far the proof must correspond, exactly, with the allegations in the claim.

We have, already, found in examining the cases bearing upon the form of the claim, that, where proper statements in the claim are omitted, the court will

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[1] 8 Leg. Int. 74.

[2] Hills *v.* Elliott, 16 S. & R. 57.

[3] Odd Fellows' Hall *v.* Masser, 12 H. 510.

often allow them to be supplied by proof. In such cases, the proof is not of any peculiar form or character, but only such as must have been offered, under any circumstances, whether the claim were sufficient or not, in order to make out a proper case. Thus omitted dates have been proved in support of the claim; and, where there has been no sufficient designation of the locality of the building, or averment of a credit given to it, the Court has allowed proof, at the trial, to supply them.[1]

But, where the statements in the claim are mistaken or incorrect, may evidence be introduced which contradicts them?

Thus, the claim must set forth the amount or sum claimed to be due, and the nature or kind of the work done, or the kind and amount of materials furnished, and the time when the materials were furnished, or the work was done, &c. Can these statements be contradicted or corrected?

It is not necessary to prove the exact amount mentioned, to be due. The plaintiff can recover no more, but he may recover less than he claims.[2] And the courts have gone still further, in their indulgence. Where an impossible date was inserted in the claim, the court allowed the plaintiff to recover upon proof of the correct date.[3]

So, in another case, it was held, that the proof upon

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[1] Rehrer *v.* Zeigler, 3 W. & S. 258. Jones *v.* Shawan, 4 W. & S. 257.

[2] Jones *v.* Shawan, sup. Hill *v.* M'Dowell, 2 H. 176.

[3] Hillary *v.* Pollock, 1 H. 186.

the trial, as to the identical days of doing the work or delivering materials, need not conform exactly with the claim.[1] Probably, the same doctrine would be held, in reference to the precise nature or kind of the work, or kind and amount of materials.

And, where the bill annexed to a claim, set forth a certain sum due as the contract price, on the trial an expert was called, to prove the measurement value of the work, the agreement having been lost, and the court sustained the proof, saying, "The measurement of the work, proved by Sterret, was competent, though different from the claim filed; inasmuch as the plaintiff could recover no more than the amount specified against a purchaser."[2]

In Hill *v.* M'Dowell, the claim was for $248,02, for "carpenter's work done to the house," and the plaintiff, in spite of objection, was allowed to prove the measurement value of what he had done.[3]

But there are limits even to the indulgence shown to this class of creditors.

Thus, it was held, that where the claim described a house as in one street, in an ejectment, by one holding, under the claim, a house in another street, parol testimony could not be admitted to show, that the latter house was intended by the description in the claim, and, that the defendant, who built it, knew that it was so.[4]

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[1] Haviland *v.* Pratt, 9 Leg. Int. 98. [2] Jones *v.* Shawan, sup.
[3] 2 H. 176. And see Thorn *v.* Heugh, 9 Leg. Int. 46.
[4] Simpson *v.* Murray, 2 B. 76.

We have seen, that a special contract, for the doing of the work or furnishing the materials, need not be mentioned in the claim. It must, of course, however, be proved on the trial, and its performance established.

It has been made a question, how far the owner is bound by a contract made by his contractor. It is evidence against him in favour of the mechanic, but is it conclusive?

In a case in the District Court for the city and county of Philadelphia it was held that it was not, but that the owner might show, that the contract price was too high, or beyond the fair market value, at the time; that the contractor had been careless of his interests, or had made an improvident and unjust bargain, and this, where no fraud was alleged.[1] And this seems to be confirmed by the Supreme Court, in a later case.[2]

The next step in the testimony is to verify the description of the house, its locality, &c. How far the proof may supply defects or omissions, in the claim, we have already shown.[3]

The work must have been done, "for or about the erection or construction," in other words, on the credit of the building. This must appear, affirmatively, from the evidence.

A usual and proper mode of proving this credit to a particular house is, by a charge to the house, on the book of original entries.

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[1] Cattanach *v.* Ingersoll, 9 Leg. Int. 7.

[2] Odd Fellows' Hall *v.* Masser, 12 H. 511.

[3] *Ante*, p. 241, &c.

There has been an apparent inclination, in the minds of some of the judges, to make the book of original entries, in all cases in which it is possible, the only evidence of this credit. And, though it has been since established, that such an entry is not indispensable, yet the courts lean strongly in favour of such evidence, and against a case in which this form of the charge is not pursued.[1]

In the case of Dickinson College *v.* Church, already largely cited, upon another point, the court says:—"It is not indispensable, as was ruled in Church *v.* Davis, (9 Watts, 304,) that the account should be opened against the building. The Act does not prescribe the kind of evidence necessary to prove, that the debt was thus contracted, but leaves that to depend upon the ordinary rules of evidence. Yet, notwithstanding, it would be well worth the serious attention of the vendors, to pay some attention to this, as, when this is omitted, the account comes before the court in rather a suspicious and questionable shape. It enables material men, when a contractor is engaged in different works, at the same time, to fasten a lien on all, or any one, or more of them, at his pleasure. The owner should have, at least, all the advantage that may arise from an unequivocal intention to hold the building answerable to the amount of the materials which may be furnished. It very often happens, that when the materials are purchased, the personal responsibility of

[1] Hills *v.* Elliott, 16 S. & R. 56. M'Mullen *v.* Gilbert, 2 Wh. 277. Kelly *v.* Brown, 8 H. 447.

the contractor is deemed amply sufficient; but subsequent events make it expedient to resort to another security. This affords a temptation, which is irresistible, to create a lien by the aid of parol testimony, when such a thing never entered into the imagination of either vendor or vendee. When this is the case, where there is more than one building, it will be, usually, entered against that building which happens to afford the best security for the debt."[1]

No particular form of the entry is necessary. It should refer to the house, for which the work is done, or materials furnished, as well as to the contractor. It should be entered as done or furnished to or for the contractor, for the building. But no case goes so far as to require the formal recital in books of account, that the work was done or materials furnished, "for or about the erection or construction," &c. Indeed the contrary has been held.[2] Where the entries require the aid or support of parol testimony, for this purpose, it is often allowed. Thus, where the book of original entries charged materials to two blocks of houses, jointly, and without discrimination, and parol evidence was absolutely necessary to specify to which block the particular materials in question were applied, the court permitted it to be given.[3]

But, notwithstanding the apparent leaning of the court, in favour of proof of a credit to the building by

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[1] 1 W. & S. 466. [2] Kelly *v.* Brown, 8 H. 447.

[3] Church *v.* Davis, 9 W. 304. Kelly *v.* Brown, 8 H. 446. Dickinson College *v.* Church, 1 W & S. 466.

the proper entry in the book, wherever it is possible, it has, frequently, been held that other evidence of such a credit may be given, where there is no such entry.

What such other evidence may or must be, is not, distinctly, defined by the decisions. But proof, that the work was upon the house, or that the materials were ordered for it, and delivered at it, appears to have been treated as making a *prima facie* case for the plaintiff, of a credit to the building. If there be proof of actual use of the materials in the building, of course, it makes a still stronger case, though that is not conclusive.

For, as it is the privilege of the plaintiff to supply, by parol testimony, an entry defective in this particular, it is, of course, permitted, that the defendant should rebut the allegation of a credit given to the house, whether there is such an entry in the books or not. And, in the effort to do this, several questions have arisen as to the competency and sufficiency of proof.

It has been urged, that there can be no credit to the building, unless materials have been delivered at the building, by the person furnishing them.

In Hinchman *v.* Graham, it was alleged that the lumber was delivered at a distance from the house. But the court do not regard the objection. They say: "But, it is said, that there is a distinction between materials delivered at or near the building, or at a distance from it. But I cannot see it, provided the delivery at a distance was in the usual course of busi-

ness, as it was in this case. It is customary to prepare part of the carpenter's work at the shop; why then should the boards be thrown down first at the building, in order to be taken up again and carried to the shop? The delivery at one place or another is no further important, than, as it furnishes evidence of the purpose for which the materials were sold. The Act of Assembly makes no mention of the place of delivery."[1]

In the same case, Yeates, J., says: "My decided opinion is, that where the materials are, *bona fide*, contracted for, with an honest understanding, on the part of the seller, that they are to be used in the erection thereof, it is of no moment, as to the creation of the lien, whether the materials were delivered, in the first instance, at or near the building, or not, or whether the same were used in the building, unless the supplier, by some unequivocal act on his part, shall evince that he waives his lien."

In other cases it has been urged as an argument against a credit to the building, that the materials furnished were not used in its construction. Such a fact may be proved, but it has been held not to be conclusive against the claim.[2]

In some cases, the proof has been, that while none of the identical materials have actually gone into the house, others, like in character and quantity, owing to substitution or confusion, or some peculiar position

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[1] 2 S. & R. 171. And see Dickinson College *v.* Church, 1 W. & S. 466.

[2] See *ante*, 118, *et seq.*

of the parties, have taken the place of those furnished, and been used in the erection.

Thus, in one case, nine mechanics and material men entered into an agreement to build, together, nine houses, each supplying work or materials, according to his trade or occupation, with the agreement, that no lien should be filed or claim made, by either party, "against either of the other parties, for any labour or materials furnished for or to either of the above mentioned buildings, except against the party or for the buildings which each shall have agreed to erect, and for such labour and materials, only, as shall be contained in such building respectively." One of the parties filed a claim for lumber against the house of another, and it was held to be sufficient for him to prove, that, within the six months, lumber of a like kind to that claimed, furnished by him, had gone into this house, and that it was not necessary for him to show a delivery of the identical lumber, upon the identical dates mentioned in his books.[1]

In the case of an apportioned claim this must, of course, be the case. It would be impossible for a material man to show into which of several houses each identical item of materials had gone.

But even the fact, that neither the materials furnished, nor any like them have been used in the house, seems not, of itself, to be conclusive against the claim.[2]

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[1] Croskey *v.* Coryell, 2 Wh. 223.

[2] Hinchman *v.* Graham, 2 S. & R. 170. Wallace *v.* Melchoir, 2 Br. 104. *Ante*, 118, and White *v.* Miller, 6 H. 52.

Again, it has been proved, that more materials have been furnished, than could have gone into the building; but the fact of a credit to it being established, the lien has stood.

But this fact, that the materials were not used in the building, may be accompanied by other circumstances which will ground a defence against the claim.

In a late case, Rogers, J., says: "It does not seem to me, that it is dealing unfairly with the plaintiff, to take the account, as it appears on his own book. But, making every allowance for the items charged in the intermediate time, there is, still, an excess of materials, to no trifling amount, charged, over the quantity which the defendants offered to show could, by any possibility, be required in the erection of such an edifice. The evidence tended strongly to show gross negligence, if not fraud, in what we esteem to have been the duty of the vendor. It is a great mistake, which cannot be too soon corrected, if any suppose, that when a person undertakes to furnish lumber to a contractor, on the credit of a building, he is relieved from inquiring into the nature of the building he trusts, whether it is brick or frame, whether it is a one or three story house, or whether it is large or small: that, in short, he can furnish materials enough to complete a three story house of the largest dimensions, when the materials are intended for a house of the most inferior description. The very fact, that he credits the building, and does not depend, altogether, on the personal responsibility of the contractor, should, it would seem, immediately sug-

gest the propriety of making the necessary inquiries, as to the size, materials and nature of the intended erection. We do not say, that a trifling excess, over what the most rigid economy would require, will vitiate the account; that would be an unnecessary, or perhaps, unjust restriction; but when it is obvious, that it is the result either of negligence or fraud, sound policy, and a just regard to the interest of owners, require, that the consequences should be visited on his own head. If any other rule is adopted, there will be no security for owners, as the materials charged may, and often will, exceed the value of the building itself."[1]

In this case, the court below ruled out evidence, that the claimant was a large contractor, and had other contracts on hand, that the lumber claimed was not delivered at the building nor used in it, but in other places; and, that it was impossible to use so large an amount in the building. But the court above let in the evidence. Among other things, however, it appeared, that the account was against the contractor, alone, and charged him with lumber of a date prior, even, to the date of the contract for erecting the building.

In a late case three propositions are laid down by the court, which we give in the very words of the opinion.

"1. That where materials for the construction of a building, contracted for in good faith, are delivered to the contractor for the building, a lien for the price of

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[1] Dickinson College *v.* Church, 1 W. & S. 466.

the materials may be filed against the building, although the materials were not *used* in the construction, nor were of the right quality for a specific use, if that fact was unknown to the seller, and they were of such a character as to justify their use in the construction, generally.

"2. That where the materials furnished are of the kind that would induce a careful, prudent and skilful man, acquainted with the building, to believe, that they could be used in its erection, and if they could, in fact, be usefully employed in its construction, then, the material man is not bound to inquire into the character of the materials which the contractor had agreed with the owner of the building to use in its construction."

"4. That if the materials were not furnished upon the credit of the building, but, upon that of the contractor, the plaintiff could not enforce his lien against the building; and even if furnished upon the credit of the building, if the contract was unfairly made, for an exorbitant price, the plaintiff could only recover, as against the building, what the materials were fairly worth; and, that, taking a note for the price, against the contractor, would not, of itself, bar a recovery against the building."[1]

The time when the materials were furnished, with reference to the commencement or completion of the building, has been made use of, to show, that no credit was given to the building. Though not conclusive,

[1] Odd Fellows' Hall *v.* Masser, 12 H. 510.

it has been received, with other evidence, as bearing upon the question. Of course, materials may be furnished so long before a commencement, or after a completion, that the material man could not have had the security of the building in his mind.[1]

The existence of a special contract has often been urged against the fact of a credit to the building. So, also, the taking of a guarantee, or a note, or bond, or other security. These cases we have mentioned, in other parts of the volume.[2] As a general rule, such special contract or security will not defeat the claim.

In one of the later cases, it was held, that an express agreement, on the part of the contractor, that no claim should be filed, for the performance of which he had given security, did not prevent a mechanic from filing his claim. How far this would have been so decided, if the mechanic had been a party to the agreement, does not appear.[3]

The plaintiff must, of course, show that his claim was filed within the six months, and the defendant may, if he can, establish the contrary.

We now come to treat of the competency of witnesses, in this connexion.

A contractor is not a competent witness for the owner. So completely is he a party in interest, and, so entirely is he involved with the owner, that his declarations are evidence against him.[4]

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[1] Case of the Olympic Theatre, 2 Br. 275. Church *v.* Allison, 10 B. 416.

[2] Ante, p. 121, etc.

[3] Young *v.* Lyman, 9 B. 449.

[4] Dickinson College *v.* Church, 1 W. & S. 464. Church *v.* The College, 3 W. & S. 220.

It has been held, that the owner might make the contractor competent, by a release from all liability.[1] But, in a later case, the Court hold, that such a release does not discharge the contractor from liability to the plaintiff for costs, and, therefore, does not render him competent.[2]

A contractor is, however, a competent witness for the mechanic,[3] and so is a sub-contractor.[4] So also, before an auditor to distribute the proceeds of a sheriff's sale of property affected by these liens, the owner was admitted on behalf of claimants.[5]

The owner is not a competent witness for the contractor, or a co-owner. If he be owner at the time of the trial, he is not a witness for his grantor, who was owner at the time the claim was filed, and, therefore, made defendant.

But, where one who has been the owner for a time, during the erection of the building, has ceased to be owner, and has no interest at the trial, he may be sworn for the defendant.[6]

In Holden *v.* Winslow, a *scire facias* was issued on a mechanic's claim, against E. C. W., with notice to C. A. W., *terre tenant.* C. A. W. was offered as a witness, on the trial. It appeared, that he had no interest in the property, when the contract for the work was made, nor when he was called as a witness, but had been owner during part of the intermediate period.

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[1] Ibid. [2] Haworth *v.* Wallace, 2 H. 120.
[3] Richabaugh *v.* Dugan, 7 B. 394. Evans *v.* Breban, 13 Leg. Int. 12. [4] Odd Fellows' Hall *v.* Massey, 12 H. 510.
[5] Hill's Est. 3 Pa. L. J. 323. [6] Jones *v.* Shawan, 4 W. & S. 257.

The Court say:—"This is a *sci. fa.* on a mechanic's lien, and is, therefore, a proceeding *in rem*, in which no one is interested, as defendant, except, as owner of the property against which the lien is sought to be established; for that, only, is chargeable with either debt or costs. The mere fact, that he has notice to appear and defend, does not make him a party; for that may be served on any one, at the pleasure of the plaintiff. No one can claim costs, by reason of such notice; for still, if he has no interest in the property, he need not appear, and has no right to be heard.

"Carpenter A. Winslow had an interest in the property when the suit was brought; but he had sold it out, before the trial. He had no interest when the contract was made. His connexion with the suit, therefore, arose, entirely, out of his relation to the property, and depended upon it. When that relation ceased, he had no more right to be heard, as a party in the proceeding. The fact, that the jury was sworn as to him, does not affect the question; for he could not be heard, to object to it, and could not be affected by it. There was no contract relation binding him to the plaintiff or affecting his competency, and he was liable to no debt or costs, and entitled to none, in that action; and he was no party to it, in any proper sense. The Court was, therefore, right in declaring him competent."[1]

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[1] 7 H. 452.

CHAPTER XIII.

LAW AND FACT.

After the evidence has closed, it becomes an important question, what is to be left for the decision of the jury, and, what is for the court to decide. Most of the points that the plaintiff must establish, in order to reach a verdict, have, at one time or other, been presented to the courts, with reference to their position in this respect.

Thus, whether any and what labour has been done or materials furnished is a question for the jury, and whether they were done or furnished on the credit of the house;[1] whether materials have been furnished in pursuance of a special contract, or not;[2] and, if the former, what the contract is, if not in writing;[3] and to what part of an account a payment is to be appropriated.[4]

So, also, it has been held to be a question for the jury, whether the lien is filed in time;[5] and, in ascer-

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[1] Presbyterian Ch. *v.* Allison, 10 B. 413.

[2] Bartlett *v.* Kingan, 7 H. 341.

[3] Yearsley *v.* Flanigan, 10 H. 489.

[4] Dickinson College *v.* Church, 1 W. & S. 462.

[5] Driesbach *v.* Keller, 2 B. 77. Harker *v.* Conrad, 12 S. & R. 301. Hillary *v.* Pollock, 1 H. 186.

taining this, to find, whether certain work done is part of the original agreement, or is part of the technical erection or construction, or only extra, or isolated work.[1]

The District Court of Philadelphia, held, that, whether a building is within the Acts relating to mechanic's liens, where the facts are undisputed, is a question for the court. They say:—"To hold otherwise would produce this result, that one mechanic and material man might recover from the building, while another, with an equally good claim, might be defeated, by the different conclusions of two different juries."[1] But the Supreme Court, in error, reversed this decision, and held, that, where such a question was "difficult to decide," it must be left to a jury.[2]

And in an earlier case, in the same District Court, the question seems to have been treated as one proper to be disposed of by an issue.[3]

It has been held to be a question for the jury, whether a building against which a claim was filed, was in a certain town, to which the Act extended;[4] whether it is sufficiently described for identification;[5] and what land is necessary for its ordinary and useful purposes.[6]

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[1] Holden *v.* Winslow, 6 H. 162. Presb. Ch. *v.* Allison, 10 B. 413.

[2] Amstrong *v.* Ware, 8 Leg. Int. 124, 8 H. 520.

[3] Perigo *v.* Vanhorn, 2 M. 362. See Smith *v.* Nelson, 13 Leg. Int. 140.

[4] Telford *v.* Wallace, 141. [5] Ewing *v.* Barras, 4 W. & S. 467.

[6] Keppel *v.* Jackson, 5 W. & S. 320.

CHAPTER XIV.

OF THE VERDICT AND JUDGMENT.

The verdict is, generally, as in other cases, for the sum due. The commencement of the building is not found, nor the extent of the surface, or estate to be affected.

In Bayne *v.* Gaylord, a certificate was given for a defendant, for a certain amount, and no objection appears to have been made.[1]

But to permit such a course would be wholly incongruous with the character of the proceeding. It is entirely *in rem*, the judgment is purely such, and authorizes no process against the person. The Act of 1808, expressly provides, "that no judgment, rendered in any such *scire facias*, shall warrant the issuing an execution, except against the building or buildings upon which the lien existed, as aforesaid." And the whole tenor of legislation and decision is to the same effect.[2]

The effect of a verdict or judgment, in this proceeding, as in others, is to lead the court to look favoura-

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[1] 3 W. 301.

[2] Holden *v.* Winslow, 7 H. 451. Matlack *v.* Deal, 1 M. 254. Anshutz *v.* M'Clelland, 5 W. 487. Leib *v.* Bean, 1 Ash. 208.

bly upon every presumption which tends to support it, and to show that it was regularly reached.

Thus, where it appeared, after a verdict for the claimant, that the largest portion of the materials included in the claim were furnished more than six months before the claim was filed, the court say: "Then, again, after a trial, we are bound to presume, that it was shown, that all the lumber was furnished under one general contract; and, if so, if any part of it is within the time, it is enough."[1]

In Lauman's Appeal, the court held, that the usual rule, that "a judgment though irregular on its face, and, even illegally recovered, cannot be impeached, collaterally, by third persons, though lien creditors of the defendant, except for fraud or collusion," applied to a judgment on a *scire facias*, upon a mechanic's lien.[2]

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[1] Fergusson *v.* Vollum, 8 Leg. Int. 64. And see Shaw *v.* Barnes, 5 B. 20. Bayer *v.* Reeside, 2 H. 167.

[2] 8 B. 477.

CHAPTER XV.

OF THE EXECUTION AND SALE, AND THEIR EFFECT.

THE execution, under the earlier Act, appears to have been a *fieri facias*.[1]

The Act of 1836 provides the writ of *levari facias*, and prescribes its form. The Commissioners say: "We suggest, in this section, that execution of a judgment, in the proceeding, shall be by writ of *levari facias*, instead of the *fieri facias*, inquisition, and *venditioni exponas*, which are now necessary. The expense of holding an inquisition is so great, that we think it ought not to be encountered, in the case of a mechanic's lien, which is, generally, of small amount. The delay, too, is sometimes very inconvenient."

We have, heretofore, referred to the cases, and Acts of Assembly, which show, what estate, and what extent of ground pass by a sale, under such a writ.

As the proceedings prior to the execution do not, peremptorily, require any exact description of the premises bound by the lien; and as the claim seldom defines them, by metes and bounds, it, generally, becomes necessary, before issuing execution, to ascertain their true description, in order to prepare for a levy.

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[1] Matlack *v.* Hoy, 2 M. 30. (note.)

In most cases, particularly in a city, where the ground necessary for the ordinary and useful purposes of the building is, generally, more distinctly defined, the plaintiff may procure his description from the record of the deed to the defendant, or by an *ex parte* survey or measurement. But, in some cases, such a course may endanger the security of a sale, by giving rise to questions which may lead to setting it aside.

The Act of 1836, after providing as we have, heretofore, noticed, for the setting out, by commissioners, of the ground necessary for the ordinary and useful purposes of the building, further enacts as follows: "If execution shall be awarded, for the levy and sale of any lot or piece of ground, upon which a building shall be erected as aforesaid, before the boundaries of the lot or curtilage which ought to be appurtenant thereto shall be designated, it shall be lawful for the court, upon application, to stay such execution until such designation shall be made; and, thereupon, order the sale to proceed, in such manner, and for such part or parts, and in such parcels, as shall be most convenient for the administration of equity among all persons interested."

This designation, it will be remembered, is made, upon the petition of the owner or any lien creditor, by commissioners appointed by the parties interested, or, if they cannot agree, by the court.

In cases of apportioned claims, different writs of *scire facias*, and *levari facias*, are issued, for each apportioned sum, against each building.

The Act of April 10, 1848, giving certain District

Courts jurisdiction, notwithstanding the apportioned sums are smaller than those of which they have jurisdiction, expressly provides: "That nothing herein contained shall prevent or impair the issuing and executing of separate writs of execution, as heretofore, against all or any of such several apportionments."

In an early case, it was held, by the court, below, that a levy and sale of the property against which the claim was filed, discharged all liens. The Supreme Court in error, however, declined to decide the question.[1]

That there was some doubt upon this subject, even so late as 1836, appears from the case of Anshutz *v.* M'Clelland, in which the court below decide, that a sale under one mechanic's claim did not discharge another; but the Supreme Court, in error, reversed the decision.

In this case, the Supreme Court say: "It is clear, that a proceeding and sale of the house, upon any one of the liens, will release it from the whole of them; and the purchaser, at the sheriff's sale, will, accordingly, hold it, entirely discharged therefrom. This is perfectly manifest, from the language of the Act of 1806; because it is expressly provided, that 'if the house should not sell for a sum of money sufficient to pay all the demands for work and materials, then, in such case, the same shall be averaged, and each of the creditors paid a sum proportioned to their several demands.' This shows, demonstratively, that there can be but one sale."[2]

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[1] Gorgas *v.* Douglass, 6 S. & R. 512. But see Leib *v.* Bean, 1 Ash. 207.

[2] 5 W. 487.

In Werth *v.* Werth, the same point was, in effect, decided.[1] The language of later Acts is too explicit to allow of doubt.

It has been made a question, how far this rule, that liens are discharged, may be made to yield to agreements between the parties.

In Twelves *v.* Williams, certain persons, having mechanic's claims filed, in view of a sale of the premises, which was about to be made by the sheriff, under an execution, agreed with A., who had already, at private sale, purchased them, subject to the claims, that he should either bid up the property, so that the proceeds would secure the claims, or buy it in, himself; and that, if he did the latter, the sale should not prejudice the claims, but that it should be considered as made subject to them. A. bought the property, and, subsequently, made a general assignment for the benefit of creditors. It was held, that his assignees were bound by the agreement of A., with the claimants, and, that the liens of the latter continued against the property, and might be enforced, notwithstanding the sheriff's sale, and the assignment.[2]

A sale, not only, regularly, discharges all liens, except those expressly saved by statute, but it puts a stop to all further steps in the cause. The plaintiff cannot proceed, even to ascertain his debt, or get his costs. The cases under this head we have already mentioned.[3]

A sale does not, of course, affect an adverse title.

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[1] 2 R. 151. [2] 3 Wh. 485. [3] *Ante*, p. 200.

A mere trespasser could never subject the freehold to a lien under any state of the law.[1]

We have, already, mentioned that the exemption Act does not apply against the claims of mechanics and material men.[2]

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[1] Bickel *v.* James, 7 W. 12.

[2] *Ante*, p. 186.

CHAPTER XVI.

OF THE DISTRIBUTION OF THE PROCEEDS.

The 9th section of the Act of 1836 provides, that: "If the building against which any claim shall be filed, as aforesaid, or any part of the ground adjacent thereto, shall be sold, by virtue of an execution, upon any mortgage or judgment, before the extent of the lien of the claimant shall be ascertained, as aforesaid, the court out of which such execution shall have issued shall have power to determine the rights of the respective parties, and the apportionment or appropriation of all liens, as aforesaid, and, for that purpose, may appoint an auditor, to inquire into and report the facts, and may decree distribution of the proceeds, accordingly; or, upon the application of any of the parties, may direct an issue, for the determination of disputed facts."

We have already seen, that a sheriff's sale arrests all further proceedings, and that the mechanics and material men, in common with judgment creditors, are put to the proceeds.[1]

Upon a sale of premises subject to mechanic's claims without reference to the contingency mentioned

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[1] Ante, p. 301, 2.

in the section just referred to, an auditor, usually, distributes the proceeds. It is unsafe for the sheriff to do so, because the time of the commencement of the building, as well as the extent of the interest and surface affected, and other matters, are questions of fact, which he cannot decide, without danger.

It is peculiarly important, therefore, to ascertain what points may be made or urged before an auditor, against a claim.

When the claim has been pursued to judgment, we have seen, that many questions are concluded, and, put at rest, as against third persons, or those claiming collaterally.

But, before judgment, other lien creditors may avail themselves of defects in a claim, in order to increase their own dividends. Thus, whether the statements of the claim, in reference to the names of the parties, the locality of the building, the nature or kind of the work done, or the kind and amount of materials furnished, and the time, &c., are correct, may be disputed before the auditor. The Supreme Court, in a late decision, say: "These views, in affirmance of the validity of the liens, make it unimportant to decide the other question made on the argument, namely, whether subsequent incumbrances can be admitted to object deficiencies in the statement, in avoidance of the lien. But, upon this point, we entertain no doubt. Until now, their right to do so has never been questioned.

"It was permitted, without objection, in the much contested case of Thomas *v.* James, 7 W. & S., 381; no one dreaming of a doubt. A claim filed is not in

the nature of a judgment pronounced by a court. It is, as was decided at the present term, but a means, partaking of the character of process, of enforcing a statutory lien. It comes not, therefore, within the principle upon which the doctrine of Hauer's Appeal, 5 W. & S. 473, and other similar cases, are based. This is proved by the whole scope of the Act of 1836, and, particularly, by the provisions of sections 5, 9, 13, 23, and 25, which, evidently, contemplate and provide modes for the interference of mortgagees, judgment-creditors, and other incumbrancers, having no estate in the premises bound."[1]

It will be found, upon examining the cases to which we refer, in this volume, that many of the most important questions have been settled upon the report of an auditor appointed to make distribution of the proceeds of property sold.

If it becomes proper for the court to direct an issue, or one of the parties should require it, it will be allowed.

In the case of Anshutz *v.* M'Clelland, the court, after saying, that upon a sheriff's sale, a claimant could not proceed, even for the purpose of liquidating his claim, say: "If, however, there should be any controversy as to the amount of the debts, which were liens, coming to any of the mechanics or others who furnished materials for the completion of the building, after it shall have been sold, and the money arising therefrom brought into court, for appropriation or dis-

[1] Knabb's Ap. 10 B. 192.

tribution, the court have the power, if it should be necessary, to have the amount ascertained by a jury, to order a feigned issue, for that purpose, when all the parties concerned in the fund will have notice, and an opportunity of being fully heard; which cannot well be in a *scire facias*, at the suit of any one of them, without notice to the others, which is never given."[1]

In Keppel *v.* Jackson, a feigned issue was directed, in order to ascertain, what land properly belonged to the house.[2]

There are questions of some difficulty which might arise in the distribution of the proceeds of premises affected by mechanic's claims, and which do not appear, from any of the decided cases, ever to have been presented.

One of these questions may arise, where, from some defect of parties or want of notice, a doubtful title or estate is sold.

If, in such a case, there be enough to pay all liens, the point would not, probably, arise; but, if the fund falls short, we can imagine questions of extreme difficulty.

We have, in discussing the subject of parties, already referred to cases, in which it has been intimated by the court, that, though the owner, at the time of issuing the *scire facias*, need not be made a party, yet, if he be not made a party, and the premises are sold under the *levari facias* upon the claim, he may be permitted to make the same defence in an ejectment, as he might

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[1] 5 W. 492. [2] 3 W. & S. 320.

have made in the *scire facias*. And, though most of these decisions were under the earlier Acts, such cases may, perhaps, arise under that of 1836.[1]

Where the courts, therefore, say, that a sale under a *levari facias*, upon one of several claims, arrests all proceedings under other claims, it must, perhaps, be construed to refer to those cases in which the absolute interest and title are sold, after a regular proceeding, against proper parties.

For, if, by reason of some defect in the proceeding, such as the neglect to make the right owner a party, a doubtful or defective title be sold,—one against which the owner might make defence in an ejectment, and a small fund be produced, it would be hard to prevent a better sale by another claimant, who had made the proper parties, which would be more productive to himself and to the other creditors.

In Anshutz *v.* M'Clelland, the claim and *scire facias*, under which the sale was made, omitted to make the owner a party; but the claim and *scire facias* of another creditor, who claimed to go on with his proceeding, in spite of the sale, was against the owner as well as the contractor. Here was the very state of facts to raise the question. The court, however, avoided it, by deciding, that the knowledge of the owner, that the contractor, who was, in fact, also, lessee of the premises, was building, made the claim bind his whole estate, as fully as if he had been made a party.[2]

If, however, the case had been one in which the

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[1] Ante, p. 216.

[2] 5 W. 490.

lessee, who was in fact the owner, and who under the state of the law at that time represented the whole estate, was not made a party, the question would, distinctly, have arisen, whether another lien creditor, who had made the owner a party, might not have proceeded.

CHAPTER XVII.

OF COSTS.

The costs of the proceeding, like those of the claim, are payable out of the proceeds of the premises, whether they are sold under the claim or not, and when they are sold, before he has prosecuted his claim to judgment, the plaintiff does not lose his costs.[1] The defendants are not, personally, bound for them; indeed the plaintiff cannot proceed, after a sale, to recover them.

In the case of Matlack *v.* Deal, a plaintiff, in a *scire facias* upon a claim, had an award of arbitrators in his favour. The defendant appealed. Pending the appeal, the premises subject to the lien were sold, and the proceeds consumed by prior liens. The defendant desired to prosecute the appeal still further, to recover back his costs; but the court would not allow him to do so. They say:—"The property, here, has been disposed of by operation of law, without any default on the part of the plaintiff. Should he obtain a judgment on a verdict, he would be unable to get execution; nor could the court aid him, in recovering the costs accruing subsequent to the appeal. As to any

[1] M'Laughlin *v.* Smith, 2 Wh. 122.

possible advantage, then, to the plaintiff, further proceedings would be altogether nugatory. On the other hand, by requiring the plaintiff to go to trial, the more opportunity is afforded to the defendant, of endeavouring to procure such a verdict as will entitle him to the aid of the court, in recovering the costs paid on the appeal and the subsequent costs. But there is no reciprocity, even, as to the question of costs. Upon the ground of public convenience, the time of the court and a jury ought not to be occupied by the trial of an issue whose direct and appropriate object has been legitimately defeated. The issue was not intended to try the mere collateral and minor question now proposed; much less was it framed for the exclusive benefit of only one of the parties. Were the court at liberty to weigh the conflicting equities, it would be manifest, that there would be much more of hardship upon a plaintiff, in compelling him to prepare for and go through a trial, in such a case, than, upon a defendant, in staying the proceedings. So far as the plaintiff advanced, he was sustained by the proper tribunal, and he is obliged to lose the security to which he had trusted. The defendant's right to appeal rested upon the payment of costs, as a condition. The due course of the law, and not the Act of the plaintiff, has rendered the appeal abortive. When the costs were paid, there was a legal adjudication in regard to them. An appeal as to them was but incidental. It must share the fate of the principal subject, upon which it was dependent." [1]

[1] 1 M. 255.

CHAPTER XVIII.

OF THE PERSONAL REMEDY.

It will be remembered, that, in the earlier decisions, the precise line of distinction, between the personal remedy and the proceeding *in rem* was not very clearly defined.

The Act of 1836 is more distinct and definite, in these respects. It leaves no doubt with reference to the character of the proceeding by claim, *scire facias* and *levari facias*, directed solely against the realty, and then expressly enacts as follows: "Provided, that nothing in this Act contained shall be construed to impair, or otherwise affect the right of any person, to whom any debt may be due for work done or materials furnished, to maintain any personal action against the owner of the building, or any other person liable therefor, to recover the amount of such debt."

The Commissioners say, in regard to this section. "Sect. 28 is new in terms. Although, perhaps, no doubt has been, heretofore, expressed of the right of mechanics and material men to bring personal actions to recover the amount due to them, notwithstanding the remedy given by the Act of 1806; yet, inasmuch as an Act of the Legislature has declared, that, when a remedy is provided by an Act of Assembly, nothing

shall be done as at common law, it seemed proper to reserve to these creditors, in express terms, a method of proceeding, without which, they may, in some cases, be unable to recover the amount due them.

While the decisions, to which we have heretofore referred, appear to establish the doctrine, that a judgment confessed by the contractor to the creditor, or even a judgment obtained adversely, is not a bar to the proceeding *in rem*, this section establishes, fully, that the latter does not stand in the way of a recovery against the person. The two remedies are cumulative.

Where the owner, himself, employs the mechanics and orders the materials, he is, of course, himself, personally liable. But if he builds through the agency of an ordinary contractor, he is not responsible.

This is clearly settled by a late decision, in the District Court, for the city and county of Philadelphia, in which Hare, J., in delivering the opinion of the court, says:—"This action was brought against the personal representatives of the late Mrs. Fassit, to recover for lumber, which was alleged to have been sold to her during her life time. It appeared, at the trial, that the lumber was not ordered by her, but by the carpenter whom she employed to do the job, in which it was used; and the only question was, as to whether he had authority to make the purchase, in her name, and bind her to pay for it. The jury were instructed, that no liability could exist under these circumstances, unless on the ground of agency, which might be, either express or implied, but could not be

presumed, without evidence of its existence. They were further told, that the employment of a contractor or jobber to do a particular piece of work, does not render him an agent, nor authorize him to pledge the credit of his employer, even for the purchases necessary for the completion of the job, and rather implies, that payment to him would be a complete fulfilment and satisfaction of the obligation incurred by the employer. But, they were, at the same time, reminded, that an agency may be coupled with a contract; and the question whether it was or not, in this instance, was left to them, on the evidence. They found a verdict for the defendant, which we think ought to stand, in point both of law and of fact. The exception which has been made, in the case of Mechanics' Liens, to the common law principle, that a contract imposes no liability, save as between the parties contracting, is quite wide enough, though confined to the building itself, and not extending beyond six months from the period at which the work is done, unless duly and openly prosecuted. Disastrous consequences would follow, were it to become the rule, and were every man who bargains with another, to be made answerable for all the obligations incurred by the latter, in carrying out the bargain: not merely, in his house but in his person; not only, for six months, but for an indefinite period. It must be remembered, that where such a liability exists, at all, it cannot be confined to one purchase, nor to any one particular transaction, but, necessarily, extends to every act of the agent, which is not, on its face, a plain departure from

his agency. Thus, if Mrs. Fassit had been liable to the plaintiff, in this case, she would have been equally so to every lumber-merchant in town from whom the carpenter whom she employed to shingle her house thought fit to buy shingles, in her name, whether the materials thus purchased actually came to her use or not. Men do not suppose, nor is there any thing in the course of business to inform them, that the employment of a workman engages their credit and estate to make good his contracts; and their liability should not be carried beyond the natural and legitimate consequence of their acts, upon a mere presumption. The employment of the carpenter, to shingle the house, was proved, in this case, clearly enough; but his authority to act as agent was wholly uncertain; and the jury but fulfilled their duty, in refusing to find that, affirmatively, which was, at the best, conjecture."

A treatise upon the form and results of the personal remedy, in ordinary cases, is, of course, not within the design of this treatise. We have merely desired to refer, in this volume, to certain peculiar relations to each other of the two proceedings.

APPENDIX.

ACTS OF ASSEMBLY.

Act of 1st April, 1803, Pamph. L. 591.

(Repealed 17th March, 1806.)

An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city of Philadelphia, the district of Southwark, and the township of the Northern Liberties.

Sect. 1. All and every dwelling-house or other building hereafter constructed and erected within the city of Philadelphia, the district of Southwark, and the township of the Northern Liberties, shall be subject to the payment of the debts contracted by the owner or owners thereof, for or by reason of any work done or materials found and provided by any brickmaker, bricklayer, stonecutter, mason, lime merchant, carpenter, painter and glazier, ironmonger, blacksmith, plasterer and lumber merchant, or any other person or persons employed in furnishing materials for, or in the erecting and constructing such house or other building, before any other lien which originated subsequent to the commencement of the said house or other building; but if such house or other building should not sell for a sum of money sufficient to pay all the demands for work and materials, then, and in such case, the same shall be averaged, and the said creditors paid an equal sum or proportion in the dollar: *Provided always*, that no such debt for work and materials shall remain a lien on the said houses or other buildings longer than two years from the commencement of the building of the same, unless an

action for the recovery thereof be instituted or the claim filed within six months after performing the work or furnishing the materials aforesaid, in the office of the prothonotary of the county where such houses or other buildings lie.

Sect. 2. This Act shall be and continue in force for three years from the passing thereof, and from thence to the end of the next session of the general assembly, and no longer.

Act of 17th March, 1806, 4 Sm. L. 300.

An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia.

Sect. 1. All and every dwelling-house or other building hereafter constructed and erected within the city and county of Philadelphia shall be subject to the payment of the debts contracted for or by reason of any work done or materials found and provided by any brickmaker, bricklayer, stonecutter, mason, lime merchant, carpenter, painter and glazier, ironmonger, blacksmith, plasterer and lumber merchant, or any other person or persons employed in furnishing materials for, or in the erecting and constructing such house or other building, before any other lien which originated subsequent to the commencement of the said house or other building: but if such house or other building should not sell for a sum of money sufficient to pay all the demands for work and materials, then, and in such case, the same shall be averaged, and each of the creditors paid a sum proportioned to their several demands: *Provided always*, that no such debt for work and materials shall remain a lien on the said houses or other buildings longer than two years from the commencement of the building thereof, unless an action for the recovery of the same be instituted or the claim filed, within six months after performing the work or furnishing the materials, in the office of the prothonotary of the county: *And provided also*, that each and every person having received satisfaction for his or their debt, for which a claim has been or shall be filed or action brought as aforesaid, shall, at the request of

any person interested in the building on which the same was a lien, or in having the same lien removed, or of his, her or their legal representatives, on payment of the costs of the claim or action, and on tender of the costs of office, for entering satisfaction within six days after such request made, enter satisfaction of the claim in the office of the prothonotary of the court where such claim was or shall be filed or such action brought, which shall, for ever thereafter, discharge, defeat and release the same; and if such person, having received satisfaction as aforesaid, by himself or his attorney, shall not, within six days after request and payment of the costs of the claim or action, and tender as aforesaid by himself or his attorney duly authorized, enter satisfaction as aforesaid, he, she or they, neglecting or refusing so to do, shall forfeit and pay unto the party or parties aggrieved any sum of money not exceeding one half of the debt for which the claim was filed or action brought as aforesaid, to be sued for and demanded by the person or persons damnified, in like manner as other debts are now recoverable by law of this Commonwealth.

Sect. 2. That the Act, entitled "An Act securing to mechanics and others payment for their labour and materials, in erecting any house or other building within the city of Philadelphia, the district of Southwark and the township of the Northern Liberties," passed the first day of April, one thousand eight hundred and three, be and the same is hereby repealed, excepting as it applies to liens cognizable by the said recited Act previous to the passing of this Act, and to actions now pending under the said recited Act. To such liens and actions (and none other) it shall continue in force to the final determination of the same.

Act of 28th March, 1808, 4 Sm. L. 528.

A supplement to an Act, entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia."

Sect. 1. The Act, entitled "An Act securing to mechanics and others payment for their labour and materials in erect-

ing any house or other building within the city and county of Philadelphia," passed March seventeenth, one thousand eight hundred and six, shall be, and the same is, hereby declared to be in full force and operation in the borough of Erie, in the county of Erie, the borough of Lancaster, in the county of Lancaster, and the borough of Pittsburgh, in the county of Allegheny; and mechanics and others, and the said boroughs, respectively, shall have like remedy, under the said Act, for securing the payment of their labour and materials, in erecting any house or other building, within the said boroughs, respectively.

SECT. 2. That in all cases of lien created by this Act, or the Act to which this is a supplement, or the Act passed the first day of April, anno Domini one thousand eight hundred and three, entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," the person having a claim filed, agreeably to their provisions, may, at his election, proceed to recover it, by personal action, according to the nature of the demand against the debtor, his executors or administrators, or by *scire facias* against the debtor and owner of the building, or their executors or administrators; and, where the proceeding is by *scire facias*, the writ shall be served, in like manner as a summons, upon the persons named therein, if they can be found within the county in which the building is situate, or are resident therein, or if they cannot be found, and are not resident in such county, by fixing a copy of the writ upon the door of the building against which the claim is filed, and, upon the return of service and failure of the defendants to appear, the court shall render judgment, as in case of a summons; but if they or either of them appear, they may plead and make defence, and the like proceedings shall be had as in personal actions for the recovery of debts: *Provided*, that no judgment rendered in any such *scire facias* shall warrant the issuing an execution, except against the building or buildings upon which the lien existed as aforesaid.

Act of 21st January, 1813, Pamph. L. 38.

An Act extending an Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," to the borough of Beaver in the county of Beaver.

SECT. 1. The Act, entitled, "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," passed March the seventeenth, one thousand eight hundred and six, with its supplement, passed the twenty-eighth of March, one thousand eight hundred and eight, shall be, and the same are hereby declared to be in full force and operation in the borough of Beaver, in the county of Beaver; and mechanics and others in the said borough, respectively, shall have like remedy, under the said Acts, as though they were herein enacted at full length.

Act of 1st March, 1815, 6 Sm. L. 250.

An Act extending an Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," to the borough of Marietta, in the county of Lancaster, and the borough of Harrisburg, in the county of Dauphin.

SECT. 1. From and after the passage hereof, the Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," passed March the seventeenth, one thousand eight hundred and six, with its supplement, passed the twenty-eighth day of March, one thousand eight hundred and eight, shall be, and the same are hereby declared to be in full force and operation in the borough of Marietta, in the county of Lancaster, and the borough of Harrisburg, in the county of Dauphin; and mechanics and others in the said boroughs, respectively, shall have like remedy, under the said Acts, as though they were herein enacted at full length.

Act of 22d March, 1817, 6 Sm. L. 445.

An Act extending the benefits of an Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building in the city and county of Philadelphia," to the mechanics and others of the borough of Reading, of the borough of Westchester, and of the towns and villages adjacent to the city of Pittsburg, and to the counties of Lancaster, Montgomery, York, Dauphin, Franklin, and Lebanon.

SECT. 2. That the Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," passed March the seventeenth, one thousand eight hundred and six, and the second section of a supplement to the said Act, passed March the twenty-eighth, one thousand eight hundred and eight, be, and the same are, hereby declared to be in force in the borough of Reading, in the county of Berks, in the borough of Westchester, in the county of Chester, and in the towns of Alleghany, Birmingham, Sidneyville, Belinstown, Byardstown, Lawrenceville, and Wilkinsburg, in the county of Alleghany, and all other towns and villages that now are or may be laid out within ten miles of the line of the city of Pittsburg, and in every part of the counties of Lancaster, Montgomery, York, Dauphin, Franklin, and Lebanon; and mechanics and others in said places shall have like remedy, under the said Act, and the said second section of the supplement thereto, for securing and recovering payment for their labour and materials for erecting any house or other building within the said places.

Act of 24th March, 1818, 7 Sm. L. 119.

An Act extending the benefits of an Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building in the city and county of Philadelphia," to the mechanics and others of the counties of Cumberland, Northumberland, Columbia, and Beaver, and for other purposes.

Sect. 1. That the Act, entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," passed March the seventeenth, one thousand eight hundred and six, and the second section of a supplement to the said Act, passed March the twenty-eighth, one thousand eight hundred and eight, be and the same are hereby declared to be in force in the counties of Cumberland, Northumberland, Columbia, and Beaver; and mechanics and others within the said counties shall have like remedy, under the said Act, and the second section of the supplement thereto, for securing and recovering payment for their labour and materials for erecting any house or building within the said counties.

Sect. 2. The several provisions of the Act of assembly of this commonwealth, passed the seventeenth day of March, one thousand eight hundred and six, entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," and of the second section of the supplement thereto, passed the twenty-eighth day of March, in the year one thousand eight hundred and eight, are hereby extended to any person or persons furnishing curbstone for the pavement of any house or building erected within the meaning of the said Act; and the said person so furnishing curbstone as aforesaid shall enjoy all the benefits and advantages of the said Act, and the supplement thereto, as fully and effectually as if they had been therein particularly mentioned.

Act of 7th March, 1821, Pamph. L. 82.

An Act extending an Act, entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," to the counties of Delaware, Bucks, Luzerne, and Mifflin.

Sect. 1. From the passage hereof, the Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within

the city and county of Philadelphia," passed March seventeenth, one thousand eight hundred and six, with its supplement, passed the twenty-eighth day of March, one thousand eight hundred and eight, shall be, and the same are, hereby declared to be in full force and operation in the counties of Delaware, Bucks, Luzerne, and Mifflin; and mechanics and others in said counties shall have like remedy, under said Acts, as though they were herein enacted at full length.

Act of 11th April, 1825, Pamph. L. 162.

An Act extending the benefits of an Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building in the city and county of Philadelphia," to the mechanics and others of the counties of Schuylkill, Berks, Erie, Somerset, and Venango, and for other purposes.

Sect. 1. That the Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," passed March the seventeenth, one thousand eight hundred and six, and the second section of a supplement to the said Act, passed March the twenty-eighth, one thousand eight hundred and eight, be, and the same are hereby declared to be, in force in the counties of Schuylkill, Berks, Erie, Somerset, and Venango; and mechanics and others in the said counties shall have like remedy, under the said Act, and the second section of the supplement thereto, for securing and recovering payment for their labour and materials for erecting any house or other building within the said counties.

Act of 10th April, 1826, Pamph. L. 345.

An Act extending the benefits of an Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building in the city and county of Philadelphia," to the mechanics of the counties of Crawford, Lycoming, Centre, Clearfield, and Indiana.

Sect. 1. That the Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," passed March seventeenth, one thousand eight hundred and six, and the second section of the supplement to the said Act, passed March twenty-eighth, one thousand eight hundred and eight, be, and the same are hereby declared to be, in force in the counties of Crawford, Lycoming, Centre, Clearfield, and Indiana; and the mechanics and others in said counties shall have like remedy, under the said Act, and the said second section of the supplement thereto, for securing and recovering payment for their labour and materials for erecting any house or other building within said counties.

Act of 16th April, 1827, Pamph. Laws, 446.

A supplement to the Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," and for other purposes.

Sect. 1. From the passage hereof the Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," passed the seventeenth of March, one thousand eight hundred and six, with its supplement, passed the twenty-eighth day of March, one thousand eight hundred and eight, shall be, and the same is hereby declared to be, in full force and operation in the county of Union; and mechanics and others in said county shall have like remedy, under said Acts, as though they were herein enacted at full length.

Act of 4th February, 1830, Pamph. L. 37.

An Act extending an Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," to the borough of Easton in Northampton county.

Sect. 1. From and after the passage of this Act, the Act entitled "An Act securing to mechanics and others payment for their labour and material in erecting any house or other building within the city and county of Philadelphia," passed the seventeenth day of March, one thousand eight hundred and six, with its supplement, passed the twenty-eighth day of March, one thousand eight hundred and eight, shall be, and the same are hereby declared to be, in full force and operation in the borough of Easton, in the county of Northampton; and mechanics and others in the said borough shall have like remedy, under said Acts, as though they were herein enacted at full length.

Act of 28th January, 1831, Pamph. L. 36.

An Act extending the provisions of the lien laws to the plumbers of the city and county of Philadelphia.

Sect. 1. From and after the passing of this Act the several provisions of the Act of the seventeenth of March, one thousand eight hundred and six, entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," and the supplements thereto, be and they are hereby extended to plumbers, for all work by them done, or materials by them found and provided, for or in the erecting and constructing of all and every dwelling-house or other building, and the hydrants and pipes appurtenant thereto, hereafter constructed and erected within the city and county of Philadelphia.

Act of 30th March, 1831, Pamph. L. 239.

An Act extending an Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," to the counties of Bedford, Cambria, Tioga, and Armstrong.

Sect. 1. From and after the passage of this Act the Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other

building within the city and county of Philadelphia," passed the seventeenth day of March, one thousand eight hundred and six, with the supplement thereto, passed the twenty-eighth day of March, one thousand eight hundred and eight, shall be, and the same are hereby declared to be, in full force and operation in the counties of Bedford, Cambria, Tioga, and Armstrong; and mechanics and others in the said counties of Bedford, Cambria, Tioga, and Armstrong shall have like remedy, under the said Acts, as though they were herein enacted at full length.

Act of 30th March, 1831, Pamph. L. 242.

An Act relative to the liens of mechanics and others.

SECT. 1. From and after the passage of this Act all claims filed or entered in pursuance of the Act to which this is a further supplement, within six months after performing the work or furnishing the materials, shall continue to bind the buildings or dwelling-houses against which the same are entered, for the term of five years from the day of filing the same; and no claim, so as aforesaid filed, shall bind any building or dwelling-house for a longer period than five years from the day of filing the same, unless, within that time, the person who has filed the same, his executors, administrators or assigns, shall issue a *scire facias* thereon.

SECT. 2. In all cases where any claim or claims has or have been filed, or shall hereafter be filed, the legal or equitable owner or owners of the buildings or dwelling-houses bound thereby, or any person interested, may apply to the court, on the proper docket of which the same is or are filed, by petition, setting forth the facts; which said court shall order an issue to be formed and tried, to ascertain if any, and what sum is due upon such claim or claims, and shall have power to make orders in relation to such issue, and the mode of trying the same, and the costs thereof, as fully as any court of equity might or could do in relation to any issue ordered by such courts of equity.

SECT. 3. In all cases where the amount of any claim has been paid and satisfied, and no satisfaction entered on the record thereof, the legal or equitable owner or owners of

the building or dwelling-house or dwelling-houses, bound by the same, may, in order to have satisfaction entered on the record, proceed against the person filing such claim, his executors, administrators and assigns, in the same manner, and shall have the rights and remedies provided for defendants and purchasers of real property, by the fourteenth section of the Act of assembly of this commonwealth, entitled "An Act to establish the judicial courts of this commonwealth, in conformity to the alterations and amendments in the constitution," passed the thirteenth day of April, one thousand seven hundred and ninety-one.

And *whereas*, it sometimes happens that several houses and other buildings, adjoining each other, are erected by the same owner, so that it is impossible for the person who has found and provided materials for the same to specify in his claim filed the particular house or other building for which the several items of his demand were so found and provided: *And whereas*, doubts have arisen as to the true construction in such cases of the laws of this Commonwealth: Therefore,

Sect. 4. It shall and may be lawful, in every such case, for the person so finding and providing materials, as aforesaid, for two or more adjoining houses, and other buildings built by the same person, owner of the same, and debtor for the said materials, to file, with his claim thereof, an apportionment of the amount of the same among the said houses and other buildings: and each of the said houses and other buildings shall be subject to the payment of its said apportioned share of the debt contracted, in the same manner as is provided by law in other cases.

Act of 7th May, 1832, Pamph. L. 539.

An Act extending "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," to the counties of Chester, Butler and Perry.

Sect. 1. From and after the passage of this Act the Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," passed the se-

venteenth day of March, one thousand eight hundred and six, with the supplements thereto, passed the twenty-eighth day of March, one thousand eight hundred and eight, and the thirtieth of March, one thousand eight hundred and thirty-one, shall be, and the same are hereby declared to be, in full force and operation in the counties of Chester (Butler) and Perry; and mechanics and others in the said counties of Chester, Butler and Perry shall have like remedy, under the said Acts as though they were herein enacted at full length.

Act of 11th April, 1835, Pamph. L. 190.

An Act extending the mechanics' lien law to the counties of Warren and Juniata, and for other purposes.

SECT. 1. The provisions of the Act passed on the seventeenth of March, one thousand eight hundred and six, entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," and of the supplement thereto, passed on the twenty-eighth of March, one thousand eight hundred and eight, shall be, and the same are hereby extended to and declared to be, in full force and operation in the counties of Warren and Juniata; and mechanics and others in the said counties of Warren and Juniata shall have like remedy, under the said Acts, as though they were herein enacted at full length, and applied to the said county of Warren.

Act of 13th April, 1835, Pamph. L. 213.

An Act to extend the laws relating to the mechanics' liens to the counties of Washington, Huntingdon, Mercer, Beaver, and Alleghany.

SECT. 1. From and after the passage of this Act, the Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," passed the seventeenth of March, one thousand eight hundred and six, and the supplements thereto, passed the twenty-eighth of March, one thousand eight hundred and eight, and the thirtieth of March, one thousand eight hundred and thirty-one, shall be

and the same are hereby extended to and in full force and operation in the counties of Washington, Huntingdon, Mercer, Beaver, and Alleghany; and mechanics and others shall have like remedies in the said counties, under the said Acts, as though the provisions thereof had been herein enacted at full length.

Act of 1st April, 1836, Pamph. L. 400.

An Act to authorize the opening and extension of Robinson and Leacock streets, and Rebecca street, in the borough of Alleghany, and the opening of a sixty feet street between out lots numbered thirty-nine and forty, in said borough, and for other purposes.

Sect. 6. The Act, entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or building within the city and county of Philadelphia," passed the seventeenth of March, one thousand eight hundred and six, and the supplements thereto, passed the twenty-eighth of March, one thousand eight hundred and eight, and the thirtieth of March, one thousand eight hundred and thirty-one, be and they are hereby extended to Susquehannah county.

Act of 16th June, 1836, Pamph. L. 695.[1]

An Act relating to the lien of mechanics and others upon buildings.

Sect. 1. Every building erected within the several counties of this commonwealth to which the Act entitled "An Act

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[1] *Remarks upon the bill entitled, "An Act relating to the Lien of Mechanics and others upon Buildings. Reported 4th January,* 1836.

The Acts of Assembly giving a specific lien on buildings for work done and materials furnished for them, established a system for which no precedent existed in our own or the English Law. The only previous instance of a character at all similar, is to be found in the act of 1784, relating to persons employed in building and repairing vessels, the subject matter of which, however, differs, in some obvious points, from that of the Act of 1806, although the phraseology of the former has been followed in some passages. It is not surprising, therefore, that defects have been discovered in the Acts in question, nor that great difficulties have been

securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city and county of Philadelphia," passed the seventeenth of March, one thousand eight hundred and six, and the several supplements thereto, now extends, shall be subject to a lien for the payment of all debts contracted for work done or materials furnished for or about the erection or construction of the same.

Sect. 2. The lien of such debt shall extend to the ground covered by such building, and to so much other ground immediately adjacent thereto, and belonging in like manner to

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experienced by the courts and the bar, in giving effect to the design of the legislature.

The policy of the system has been, often and seriously, questioned, and doubts have been, frequently, expressed, whether, upon the whole, it works well even for those for whose benefit it was enacted, since it tends to clog the transfer of real estate, by the risk in which it involves purchasers and mortgagees. The example set by this state, however, has been followed in some others, and recently by Congress, in relation to the District of Columbia, by the adoption, in the same words, of the Act of 1806 and 1808. Public opinion also seems favourable to a continuance of the system, since the lien which, by the Act of 1806, was confined to the city and county of Philadelphia, has, by successive Acts, been extended to thirty-nine counties, besides several boroughs or towns.

It is deemed best, therefore, to retain the principal features of the existing law, with such modifications, however, as may tend to remove the difficulties alluded to, and to render it more consonant with other parts of our code.

Sect. I. The first section makes the provision general. It has already been extended over the principal part of the state, rural as well as urban, and we see no reason why it should not be general. If it should not be acceptable, however, in any country or place, a section may be added excepting such place. We have in this section omitted the enumeration of particular mechanics and material men, since the general words of the Act of 1806 seemed to render it necessary.

Sect. II. The second section is new in terms, and has been introduced, for the purpose of removing a difficulty which arose very early after the passage of the Act of 1806. That Act says, "every dwelling-house or other building shall be subject," &c. These words give no lien to the mechanics, &c., upon the ground or land occupied by a building, or adjacent to it. The rule of the common law is, that the ownership of the soil carries with it every thing erected upon it, except under special circumstances; and it has never been supposed that the reverse of this, viz. that a right of lien

the owner of such building, as may be necessary for the ordinary and useful purposes of such building, the quantity and boundaries whereof shall be determined as follows:

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upon a house affected the ownership of the soil, could be sustained, upon any sound principle. It is plain, however, that a lien upon a building merely, without any ownership in, or control over the soil which it covered, would be of little avail to the mechanic; and even if the ground under the building were supposed to pass with it, the value of the building would be trifling, in most situations, if deprived of the use of the ground immediately adjacent to it. Other creditors, however, holding mortgages or judgments, disputed the right of lien creditors, under this law, to more than the mere building, or at all events to more than the ground actually occupied by it. The construction given by the courts of Philadelphia to this provision, was perhaps not free from objection, but it certainly tended to give efficacy to these liens, which it was the design of the legislature to encourage. They held that the lien attached, not only to the building and the ground occupied by it, but to so much of the adjacent ground as was necessary and proper for the ordinary purposes of the building. The practice of many years has been in accordance with this view of the law. A recently reported decision, however, of the Supreme Court at Pittsburgh (M'Donald *v.* Lindall, reported in 3 Rawle, 492,) has tended to throw some doubt upon the correctness of the present construction of the Act; and at all events, the uncertainty in which, by the practice, the extent of the lien is left, seem to require some definite legislative provision. It is believed, that it was the intention of the legislature to give the mechanics and material men the benefit of a lien upon a building, with all the appurtenances that confer a value upon it, in the absence of any express stipulation on the subject. But how are these appurtenances to be ascertained? Certainly not by any general rule to be laid down in the first instance. A dwelling-house in a city or borough, for example, has usually attached to it a lot of ground of sufficient depth for the usual outbuildings, and, at all events, for the benefit of light and air. A barn in the country, in the middle of a field, would be of little value, if there were no right to approach it. Almost every species of building has some appurtenances, which vary with the different kinds of building. If, then, it can be conceded, that this lien extends to the appurtenances of a building, the difficulty will still remain of deciding upon the extent thereof. It would be, obviously, wrong to leave it to the lien creditor to define the extent of his lien, for himself, on filing his claim. Nor is there, at present, any authority in the court to interfere, before the proceeds of the sheriff's sale are brought in. They then endeavour to do justice between the different species of incumbrances, by apportioning the fund among them, according to what they suppose to be the extent of their respective rights. But if, in law, the lien of the mechanic is limited, as it must be somewhere, or to some extent of ground, the sheriff, upon an execution on his claim,

SECT. 3. It shall be the duty of the prothonotary of the Court of Common Pleas of every county to which the provisions of this Act extend, and the prothonotary of the District Court of the city and county of Philadelphia, respectively, and of the city and county of Lancaster, the District Court of Alleghany county, to procure and keep a book or docket, which shall be called the "Mechanics' Lien Docket," in which he shall cause to be entered and recorded all descriptions or designations of lots or pieces of ground, as hereinafter mentioned, and all claims that may be filed by virtue of this Act, together with the day of filing the same; and he shall cause the names, as well of the owner of the lot or piece of ground

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can sell no more than to that extent, and the purchaser will certainly be in doubt about the extent of his purchase.

In the bill now submitted, an effort has been made to obviate the difficulties alluded to, which at least, as respects some of those mentioned, will, we think, be found successful. It is proposed, in the third section, to provide that the prothonotary shall keep a docket, in which all the proceedings relating to mechanics' liens shall be contained. The object is, by concentrating all that relates to particular buildings, to facilitate inquiry and notice. In the fourth section, we propose that the owner of a piece of ground, who may be about to contract for the erection of a building thereon, may, before the commencement thereof, designate the boundaries of the lot, so as to fix the amount which shall be considered as appurtenant to the building. To this, we presume, there can be [no] objection, as it will take place before any right accrues to the mechanic, and is to be entered in the book we have mentioned. The fifth, sixth and seventh sections, provide for the case of the owner having failed to make such designation, and authorize the court, on the application of any person interested, to appoint commissioners to examine and report on the proper extent of these appurtenances, and provide for the due execution of their duties by the commissioners. In the eighth section, power is given to the court to stay execution upon any judgment or other proceeding, until the extent of the boundaries shall be designated by commissioners as aforesaid, and the ninth section recognises the power at present exercised by the courts, of apportioning the proceeds of a sheriff's sale of real estate according to the extent of the several liens.

These sections have been framed with a view to the just rights of the various parties interested, as well judgment creditors and mortgagees as the builders and owners of the ground, and will be found, we think, to provide at least some improvement on the present law, by relieving the public and the parties from the frequent and protracted litigation to which the prevailing uncertainty respecting the extent of the lien gives rise.

as of the contractor, architect or builder, if such be named, and of the person claiming any lien under this Act, to be alphabetically indexed therein.

SECT. 4. It shall be lawful for the owner of any lot or piece of ground, who may be desirous of erecting, or of contracting with any other person for the erection of any building as aforesaid, to declare or define in writing the boundaries of the lot or curtilage appurtenant to such building, previously to the commencement thereof, and cause the same to be entered in a book aforesaid; and such designation of boundaries, so made and entered upon record, shall be obligatory upon all persons concerned.

SECT. 5. In default of such designation of boundaries previously to the commencement of any building, it shall be lawful for the owner of such lot or piece of ground, or for any person having a lien on the same, by mortgage, judgment or otherwise, or entitled to a lien by virtue of this Act, to apply by petition, in writing, to the proper court, to appoint competent and skilful persons as commissioners to designate the boundaries aforesaid.

SECT. 6. It shall be the duty of the court to whom application shall be made as aforesaid, after reasonable notice given to all parties interested, to appoint such competent persons commissioners as aforesaid, as all the parties interested shall nominate; but if the parties cannot agree upon a nomination, it shall be lawful for the court to appoint such competent persons, for that purpose, as they shall think proper.

SECT. 7. It shall be the duty of the commissioners so appointed to examine the building, or place at which such building is being erected, and to make a report to the court, in pursuance of the order to them directed; and, in such report, they shall sufficiently designate and describe, by metes and bounds, with their courses and distances, and by a draft, if necessary, the limits and extent of ground necessary for the convenient use of such building, for the purposes for which it is designed; and such report shall be entered at length upon the record book aforesaid, and, if approved by the court, shall be conclusive upon all persons concerned.

SECT. 8. If execution shall be awarded for the levy and

sale of any lot or piece of ground, upon which a building shall be erected as aforesaid, before the boundaries of the lot or curtilage which ought to be appurtenant thereto shall be designated, it shall be lawful for the court, upon application, to stay such execution until such designation shall be made; and, thereupon, order the sale to proceed, in such manner, and for such part or parts, and in such parcels, as shall be most convenient for the administration of equity among all persons interested.

SECT. 9. If the building against which any claim shall be filed as aforesaid, or any part of the ground adjacent thereto, shall be sold by virtue of an execution, upon any mortgage or judgment, before the extent of the lien of the claimant shall be ascertained as aforesaid, the court out of which such execution shall have issued shall have power to determine the rights of the respective parties, and the apportionment or appropriation of all liens as aforesaid; and for that purpose, may appoint an auditor to inquire into and report the facts, and may decree distribution of the proceeds accordingly, or, upon the application of any of the parties, may direct an issue for the determination of disputed facts.

SECT. 10. The lien for work and materials as aforesaid shall be preferred to every other lien or incumbrance which attached upon such building and ground, or either of them, subsequently to the commencement of such building.[1]

SECT. 11. Every person entitled to such lien shall file a claim or statement of his demand in the office of the prothonotary of the Court of Common Pleas of the county in which the building may be situate.

SECT. 12. Every claim as aforesaid must set forth:[2]

First, The names of the party claimant, and of the owner or reputed owner of the building, and also of the contractor,

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[1] SECT. X. Is taken from the first section of the act of 1806.

[2] SECT. XIII.* In the thirteenth section, it is proposed to declare certain points to be essential to the validity of a claim. The object of filing a claim, is to give notice to third persons of the names of the parties, the

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[3] * The eleventh section of the report of the Commissioners was omitted by the legislature. The remarks to section thirteen refer to section twelve of the law, and so on.

architect or builder, where the contract of the claimant was made with such contractor, architect or builder.

Second, The amount or sum claimed to be due, and the nature or kind of the work done, or the kind and amount of materials furnished, and the time when the materials were furnished or the work was done, as the case may be.

Third, The locality of the building, and the size and number of the stories of the same, or such other matters of description as shall be sufficient to identify the same.

SECT. 13.[1] In every case in which one claim for materials shall be filed by the person preferring the same against two or more buildings owned by the same person, the person filing such joint claim shall, at the same time, designate the amount which he claims to be due to him on each of such buildings, otherwise such claim shall be postponed to other lien creditors; and the lien of such claimant shall not extend beyond the amount so designated, as against other creditors, having liens by judgment, mortgage or otherwise.

SECT. 14.[2] Every such debt shall be a lien, as aforesaid, until the expiration of six months after the work shall have

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amount alleged to be due, and the property upon which the lien is claimed. Unless these are distinctly stated, it is obvious that the notice is of little value. Many claims, however, have been filed, deficient in these essentials, probably from want of sufficient precision in the law. It is believed that the directions of this section can be followed by the lien creditors without difficulty, and that it will tend to facilitate their entering claims without professional assistance.

[1] SECT. XIV. Alters somewhat the provision of section four, of the act of 1831, the preamble to which explains the necessity of the provision. The last part of that section, which says that the several buildings shall be liable to the apportionment made by the claimant, has been omitted because it seems objectionable that the party should have a right conclusively to fix the liability of property which may be in the hands of a third person; though it is proper that, having made an apportionment, he should be bound by it as against other creditors or purchasers. It is believed to be best to leave the correctness of the apportionment to be determined by the court, or a jury, if the parties interested should dispute it.

[2] SECT. XV. In this section the provision of the first section of the act of 1806, is materially altered. The original has given rise to great doubt and litigation; besides which, it is believed to operate injuriously upon the owners of property and incumbrancers, by the uncertainty in which it keeps them for an unnecessarily long period. "The commencement of

been finished or materials furnished, although no claim shall have been filed therefor; but such lien shall not continue longer than the said period of six months, unless a claim be filed, as aforesaid, at, or before the expiration of the same period.

SECT. 15. The proceedings to recover the amount of any claim, as aforesaid, shall be by a writ of *scire facias*, in the following form: viz.

County, *ss.*

The commonwealth of Pennsylvania to the sheriff of said county, greeting:

Whereas hath filed a claim in our (court) for the county of , against for the sum of , for (work done or materials furnished, as the case may be) to (or for) a certain building: to wit (describing it as in the claim:) *And whereas*, it is alleged that the said sum still remains due and unpaid to the said ; now we command you that you make known to the said , and to all such persons as may hold or occupy the said building, that they be and appear before the judges of our said court at a court of , to be held at , on the of next, to show, if any thing they know or have to say, why the said sum of should not be levied of the said building, to the use of the said , according to the form and effect of the Act of Assembly in such case made and provided, if to them it shall seem expedient, and have you then and there this writ.

Witness.

SECT. 16. *Provided*, That no such *scire facias* shall in any

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the building," from which the two years begin to run, does not afford that general rule which is desirable; some few buildings requiring more than two years to finish, while others are completed in much less time. Besides, it is in most instances very difficult for third persons to ascertain when the particular work was performed, or materials furnished, from which the six months run: consequently, the risk of purchasers of real estate is greatly augmented. The limitation in the section now suggested, seems more simple and less likely to embarrass. As long as the building is in progress, sufficient notice is given, and the period of six months after it is finished, seems to give ample opportunity for the filing of the lien.

case be issued within fifteen days previous to the return day of the next term.

Sect. 17.[1] The writ of *scire facias* aforesaid shall be served in the same manner as a summons, upon the defendant therein named, if he can be found within the county, and a copy thereof shall also be left with some person residing in the building, if occupied as a place of residence; but, if not so occupied, it shall be the duty of the sheriff to affix a copy of such writ upon the door or other front part of such building.

Sect. 18. It shall, also, be the duty of the sheriff to whom any such writ of *scire facias* may be directed, to give notice thereof to all other claimants and persons interested, by advertisements in two daily newspapers published in his county, as the case may be, at least ten days before the return day of the writ, in each county where such papers are published; but, when daily papers are not so published, then in two weekly newspapers, if so many are published therein, or if but one weekly newspaper is published in such county, in such newspaper, or if no paper is published in such county, in a paper

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[1] Sect. XVII. to XIX. These sections have been introduced for the purpose of giving some additional notice to third persons interested, of the proceedings upon a claim. The provisions of the existing law seem to be sufficient, as respects the owner of the property with whom, or on whose account, the contract was made; but they are strikingly deficient with respect to third persons, such as purchasers, mortgagees, judgment creditors, and *other mechanics* and *material men*, since they provide no kind of notice to them, while they may be greatly prejudiced by the proceeding. Frequently the owner of property is insolvent, and indisposed to contest the amount of a claim. Sometimes he may collude with the claimant, and a judgment may thus be obtained on a *scire facias* to a much greater amount than the justice of the case would warrant; whereas, if the lien creditors had had notice, they might have come in and disputed the amount.

But how is notice to be given to them? Ought they to be made parties to the suit, as is required in chancery in England, or served with a rule to appear and take defence if they think proper? The objection to this is, that it imposes on the claimant great expense and inconvenience in making search for all these persons, whom it will be necessary to trace through the various offices, especially in the case of mortgages, which must be searched for against all persons who have previously held the property; and even after all pains taken, some persons interested might remain undiscovered. The expense, too, of serving writs or notices upon those who were ascer-

published nearest thereto, for four successive weeks before the return day thereof.[1]

Sect. 19. Upon the return of such writ, it shall be lawful for any other person, having filed a claim as aforesaid, to cause to be entered on the record of the same suit, a suggestion, setting forth the amount and nature of his demand, and thereupon he may have a rule upon the defendant to appear and plead thereto, as in other actions.

Sect. 20. If the defendant shall appear and plead to such suggestion, and issue either in fact or law be joined upon any plea, such particular issue shall be tried and determined as in other cases: if the defendant shall not plead to such suggestion, after due notice, judgment shall be entered for the claimant filing the same, and the amount of the claim shall be ascertained as in other cases.

Sect. 21. The execution for every such judgment shall be by a writ of *levari facias*, in the following form:

County, *ss.*

The commonwealth of Pennsylvania to the sheriff of said county, greeting:

We command you, that without any other writ from us, of the following described building and lot of ground of A. B., to wit (describing the same according to the record,) in your bailiwick, you cause to be levied, as well a certain debt of , which C. D., lately in our Court of Common Pleas

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tained to be interested, would be very great. The least expensive, and in some respects, the most certain mode, seems to be that of public advertisement, which is adopted in many other cases. The provision which we have added in the eighteenth section, that a copy of the *scire facias* shall in all cases be left at the building, or affixed thereto, will come in aid of the other means of notice. To give an opportunity of advertising for a sufficient length of time, it is necessary that there should be an interval of at least fifteen days between the issuing and return of the writ, which is the object of the seventeenth section.

Sect. XX. and XXI. These sections are intended to provide a method by which other lien creditors may come in and avail themselves of the opportunity of the suit commenced, without the delay and expense of issuing successive writs of *scire facias*. This mode of proceeding is not without precedent even in our own jurisprudence.

[1] This section is repealed by Act of March 30, 1812.

for the county aforesaid, by the consideration of the said court, recovered of the said A. B., to be levied of the said building and lot of ground, as also the interest thereon from the day of , A. D. ; also, the further sum of , which E. F. lately, in our said court for the county aforesaid, by the consideration thereof, recovered of the said A. B. to be levied of the said building and lot of ground, as also the interest thereon from the day of , A. D. , amounting in the whole to the sum of , and also the sum of , for the costs which accrued thereon, according to the form and effect of an Act of Assembly of the Commonwealth of Pennsylvania in such case made and provided, and have you these moneys before our judges at , at our County Court of Common Pleas, there to be held on the day of next, to render unto the said C. D. for his debt, interest and costs aforesaid, and have you then there this writ, &c.

Sect. 22.[1] *Provided*, That if the proceeds of such building and ground, as aforesaid, shall not be sufficient to pay the full amount of all debts due, as aforesaid, for work done and materials furnished, after deducting therefrom any prior liens upon the same, then such debts shall be averaged, and the creditors aforesaid shall be paid in proportion to their respective demands.

Sect. 23. In every case in which any claim shall be filed against any building as aforesaid, and no *scire facias* shall have issued thereon, it shall be lawful for the owner of such building, or any person interested therein, to apply by petition to the court in which such claim shall be filed, setting forth the facts, whereupon, such court may grant a rule upon

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[1] Sect. XXII. We suggest, in this section, that execution of a judgment in this proceeding shall be by writ of *levari facias* instead of the *fieri facias*, inquisition, and *venditioni exponas*, which are now necessary. The expense of holding an inquisition is so great, that we think it ought not to be encountered in the case of a mechanic's lien, which is generally of small amount. The delay, too, is sometimes very inconvenient.

It will be seen that the sheriff is directed by this writ to levy, as well for the debts of the other lien creditors, as of the particular plaintiff.

Sect. XXIII. Is taken from the first section of the Act of 1806.

the party claimant, and others interested, to appear in court at a time to be fixed for such purpose, and on the return of such rule may proceed in like manner as if a *scire facias* had been issued by such claimant, and had been duly served and returned.

SECT. 24.[1] The lien of every such debt, for which a claim shall have been filed as aforesaid, shall expire at the end of five years from the day on which such claim shall have been filed, unless the same shall be revived by *scire facias*, in the manner provided by law in the case of judgments, in which case, such lien shall continue in like manner, for another period of five years, and so from one such period to another, unless such lien be satisfied, or the same be extinguished by a sheriff's sale, or otherwise, according to law.

SECT. 25. In every case in which the amount of any claim as aforesaid shall be paid or otherwise satisfied, it shall be the duty of the claimant, or his legal representative, at the request of the owner of the building, or of any other person interested therein, and on payment of the costs, to enter satisfaction on the record of such claim, in the office of the prothonotary of the court in which such claim shall have been entered, which shall for ever thereafter discharge and release the same.

SECT. 26.[2] If any person who shall have received satisfaction as aforesaid, shall neglect or refuse to enter satisfaction of such claim, as aforesaid, within sixty days after request, and payment of the costs of suit, as aforesaid, he shall forfeit and pay to the party aggrieved any sum not exceeding one half of the amount of such claim, to be recovered as debts of a like amount are recoverable.

SECT. 27. *Provided*, That nothing in this Act contained shall be construed to impair, or otherwise affect the right of any person to whom any debt may be due for work done, or materials furnished, to maintain any personal action against the owner of the building, or any other person liable therefor, to recover the amount of such debt: *Provided further*, That

[1] SECT. XXIV. From the second section of the Act of March 30th, 1831.
[2] SECT. XXVI. and XXVII. From the Acts of 1806 and 1831.

nothing in this act contained shall be construed to affect the relative jurisdiction of the Court of Common Pleas, and the District Court of the city and county of Philadelphia, which shall remain as heretofore.[1]

SECT. 28. The several provisions of this act are hereby declared to be extended to the county of Lehigh.

SECT. 29. The lien hereinbefore given is hereby declared to extend to plumbers, and to persons furnishing curbstone for the pavement of any building as aforesaid, within the city and county of Philadelphia.

SECT. 30. This Act shall take effect from and after the first day of September next, and so much of any law as is altered by this Act is hereby repealed from that period.

Act of 4th April, 1837, Pamph. L. 298.

An Act further to incorporate the district of the Northern Liberties, in the county of Philadelphia, and for other purposes.

SECT. 11. That such provisions of the several Acts of Assembly of this Commonwealth which have been altered or supplied by the following Acts, viz., "An Act relating to the commencement of actions;" "An Act relating to reference and arbitration;" "An Act relating to assignees for the benefit of creditors and other trustees;" "An Act relating to the attachment of vessels;" "An Act relative to the organization of courts of justice;" "An Act relative to bonds, with penalties and official bonds;" "An Act relating to counties

[1] SECT. XXVIII. Is new in terms. Although perhaps no doubt has been heretofore expressed of the right of mechanics and material men to bring personal actions to recover the amount due to them, notwithstanding the remedy given by the Act of 1806; yet inasmuch as an Act of the legislature has declared, that when a remedy is provided by an Act of the Assembly, nothing shall be done as at common law, it seemed proper to reserve to these creditors, in express terms, a method of proceeding, without which they may in some cases be unable to recover the amount due to them.

SECT. XXIX. The concluding section extends the provisions of the Act to plumbers and persons furnishing curb stone, and follows in this respect the Acts of 1818 and 1831. It seems proper to provide for them specially here, as they are not necessarily included in the general terms of the first section.

and townships, and county and township officers;" "An Act relating to county rates and levies, and township rates and levies;" "An Act relative to the jurisdiction and powers of the courts;" "An Act relating to domestic attachments;" "An Act relating to executions;" "An Act relating to insolvent debtors;" "An Act relating to lunatics and habitual drunkards;" "*An Act relating to the lien of mechanics and others upon buildings;*" "An Act relating to orphans' courts;" "An Act relating to the support and employment of the poor;" "An Act relating to registers and registers' courts;" "An Act relating to roads, highways and bridges," be and continue in force, so far as may be necessary to carry into full effect any proceedings not consummated at the times when the several Acts hereinbefore enumerated came into operation; and all proceedings since the passing of the said specially enumerated Acts, which have taken place in conformity with prior existing laws, shall be deemed and taken to be good and valid to all intents and purposes.

Act of 16th April, 1838, Pamph. L. 626.

An Act granting certain powers to the authorities of the cities of Lancaster and Philadelphia, and for other purposes.

SECT. 19. That, from the passage hereof, the Act entitled "An Act securing to mechanics and others payment for their labour and materials in erecting any house or other building within the city of Philadelphia," passed the seventeenth day of March, one thousand eight hundred and six, with its supplement, passed the twentieth[1] day of March, one thousand eight hundred and eight, shall be, and the same is hereby declared to be, in full force and operation in the county of Bradford; and mechanics and others in said county shall have like remedy, under said Acts, as though they were herein enacted at full length.

SECT. 34. That the several provisions of the Act of sixteenth of June, one thousand eight hundred and thirty-six,

[1] This should be the *twenty-eighth* day of March.

entitled "An Act relating to the lien of mechanics and others upon buildings," are extended to wharf-builders, and all concerned in the making or constructing of the same.

Act of April 16th, 1840, Pamph. L. 412.

An Act relating to executions, and for other purposes.

SECT. 8. That from and after the passage of this Act, the Act entitled "An Act relating to the lien of mechanics and others upon buildings," passed the sixteenth day of June, one thousand eight hundred and thirty-six, shall be and the same is hereby extended and declared to be in full force and operation in the counties of Wayne and Fayette; and mechanics and others in said counties shall have like remedy, under the said Act, as though it was herein enacted at full length.

Act of April 28th, 1840, Pamph. L. 474.

An Act to authorize the Governor to contract with the corporation of the borough of Harrisburg, for supplying the public buildings with water, and for other purposes.

SECT. 24. That the lien created by the Act entitled "An Act relating to the lien of mechanics and others upon buildings, passed the sixteenth day of June, one thousand eight hundred and thirty-six," shall not be construed to extend to any other or greater estate in the ground on which any building may be erected, than that of the person or persons in possession at the time of commencing the said building, and at whose instance the same is erected; nor shall any other or greater estate, than that above described, be sold by virtue of any execution authorized or directed in said Act.

Act of March 19th, 1841, Pamph. L. 99.

An Act to incorporate the Lancaster County Mutual Insurance Company, and to extend the Mechanics' Lien Law to the County of Clinton.

SECT. 14. That the provisions of the Act of the sixteenth of June, one thousand eight hundred and thirty-six, entitled, "An Act relating to the lien of Mechanics and others, upon

buildings," be and the same are hereby extended to the county of Clinton.

Act of April 6th, 1841, Pamph. L. 163.

An Act to incorporate the Village of Clarion, in the County of Clarion, into a Borough, and for other purposes.

SECT. 22. That the several provisions of the Act passed the sixteenth day of June, one thousand eight hundred and thirty-six, entitled "An Act relating to the lien of mechanics and others, upon buildings," be and they are hereby declared to be extended to the counties of Clarion and M'Kean.

Act of February 10th, 1842, Pamph. L. 22.

An Act supplementary to an Act entitled "An Act relating to the Lien of Mechanics and others upon buildings," passed the sixteenth day of June, one thousand eight hundred and thirty-six.

SECT. 1. That the provisions of the Act entitled, "An Act relating to the lien of mechanics and others upon buildings," passed the sixteenth day of June, one thousand eight hundred and thirty-six, and also the provisions of the twenty-fourth section of "An Act entitled an Act to authorize the Governor to contract with the corporation of the Borough of Harrisburg for supplying the public buildings with water and for other purposes," passed the twenty-eighth day of April, one thousand eight hundred and forty, be and the same are hereby extended to Bradford and Monroe counties; and mechanics and others in said counties shall have like remedy, under said Act, as though they were herein enacted at full length.

SECT. II. The nineteenth section of the Act entitled, "An Act granting certain powers to the Authorities of the cities of Lancaster and Philadelphia, and for other purposes," passed the sixteenth day of April, one thousand eight hundred and thirty-eight, is hereby repealed, saving and reserving, however, the rights of all persons to complete any proceedings begun under the same.

Act of March 25th, 1842, Pamph. L. 197.

An Act to appoint Commissioners to re-survey and mark that portion of the county line which divides the township of Bristol, in the county of Philadelphia, from the township of Cheltenham in the county of Montgomery, and for other purposes.

SECT. 30. An Act relating to the liens of mechanics and others upon buildings, passed the sixteenth day of June, one thousand eight hundred and thirty-six, shall be and the same is hereby extended and declared to be in full force and operation in the county of Greene, and mechanics and others in said county shall have like remedy under the said Act as though it was herein enacted at full length.

Act of March 30th, 1842, Pamph. L. 213.

An Act to legalize certain proceedings in the Court of Common Pleas of Adams County, and for other purposes.

Sect. 3. That the eighteenth section of an Act entitled "An Act relating to the lien of mechanics and others upon buildings, passed the sixteenth June, eighteen hundred and thirty-six, requiring the publication of the writ of *scire facias*, by advertisements in daily or weekly newspapers, is hereby repealed.

Act of August 2nd, 1842, Pamph. L. 464.

An Act annexing the county of Schuylkill to the Eastern District of the Supreme Court, and for other purposes.

SECT. 29. That the provisions of the twenty-ninth section of the Act of sixteenth June, eighteen hundred and thirty-six, entitled "An Act relating to the lien of mechanics and others upon buildings," be and the same is hereby extended to the county of Dauphin.

Act of April 5th, 1843, Pamph. L. 171.

A further supplement to the Act entitled "An Act relating to the lien of mechanics and others on buildings."

SECT. 1. That the provisions of the Act entitled "An Act relating to the lien of mechanics and others upon buildings,"

passed the sixteenth day of June, one thousand eight hundred and thirty-six, shall be extended to the counties of Potter and Jefferson.

Act of April 24th, 1843, Pamph. L. 357.

An Act to incorporate the Manayunk Fire Engine Company of the county of Philadelphia, and for other purposes.

SECT. 4. That the provisions of the twenty-ninth section of the Act of the sixteenth day of June, Anno Domini one thousand eight hundred and thirty-six, entitled "An Act relating to the lien of mechanics and others upon buildings," be, and the same is hereby extended to the county of Northampton: *Provided*, That nothing herein contained shall be understood or construed so as to change, alter, impair or affect any contracts that shall have been made before the passage of this Act.

Act of March 19th, 1844, Pamph. L. 140.

A further supplement to an Act, entitled "An Act relating to the lien of mechanics, and others on buildings."

SECT. 1. That the provisions of the Act, entitled "An Act relating to the lien of mechanics, and others, upon buildings," passed the sixteenth day of June, one thousand eight hundred and thirty-six, shall be extended to the county of Northampton: *Provided, however*, That nothing herein contained shall be understood or construed, so as to change, alter, impair or affect, any contracts that shall have been made before the passage of this Act.

Act of May 6th, 1844, Pamph. L. 565.

An Act further to regulate proceedings in Courts of Justice, and for other purposes.

SECT. 9. That the lien given by the Act of sixteenth June, one thousand eight hundred and thirty-six, entitled "An Act relating to the lien of mechanics and others upon buildings," is hereby declared to extend to plumbers, and to persons furnishing curbstones for the pavement of any building within the bounds of the city of Lancaster.

Act of April 16th, 1845, Pamph. L. 538.

An Act concerning certain sheriffs' and coroners' sales, and for other purposes.

SECT. 5. It is hereby declared, that the provisions of the Act approved June 16, eighteen hundred and thirty-six, entitled "An Act relating to the lien of mechanics and others upon buildings," according to the true intent and meaning thereof, extend to and embrace claims for labour done, and materials furnished and used in erecting any house or other building which may have been or shall be erected under or in pursuance of any contract or agreement for the erection of the same, and the provisions of the said Act shall be so construed; and no claim which has been or may be filed against any house or other building, or the lien thereof, or any proceedings thereon, shall be in any manner affected by reason of any contract having been entered into for the erection of such building, but the same shall be held as good and valid as if the building had not been erected by contract: *Provided*, That no case shall be affected by this section, which may have been decided by the Supreme Court, or in which the proceeds of the sale of any real estate may have been distributed by the decree of any court, from which no appeal has been taken.

Act of March 11th, 1846, Pamph. L. 113.

Supplement to an Act, entitled "An Act relating to the liens of mechanics and others upon buildings."

SECT. 1. That the provisions of the Act relating to mechanics' liens passed the sixteenth day of June, one thousand eight hundred and thirty-six, with its supplements; and the fifth section of the Act entitled "An Act concerning certain sheriffs' and coroners' sales, and for other purposes," passed April sixteenth, eighteen hundred and forty-five, be and the same are hereby extended to Pike county.

Act of April 13th, 1846, Pamph. L. 327.

A supplement to the Act entitled "An Act relating to the lien of mechanics, and others, upon buildings," and for other purposes.

SECT. 1. That the several provisions of the Act entitled "An Act relating to the lien of mechanics, and others, upon buildings," passed sixteenth of June, Anno Domini one thousand eight hundred and thirty-six, together with the several supplements thereto, be, and the same are hereby extended to the county of Adams.

Act of April 10th, 1848, Pamph. L. 449.

An Act extending the chancery powers of, and to the jurisdiction and proceedings in, certain courts.

SECT. 5. The District Courts of the counties of Philadelphia, Lancaster, and Alleghany, shall have jurisdiction of all joint claims against two or more buildings owned by the same person or persons, now filed, or that may be filed in said respective counties, in accordance with the provisions of an Act entitled "An Act relating to the liens of mechanics and others, upon buildings," passed June 16th, one thousand eight hundred and thirty-six, wherein such mechanics and others claim a sum equal to that of which said courts have respectively jurisdiction, according to the several Acts heretofore passed, constituting and regulating them, notwithstanding the several apportioned claims therein be less than the sum of which said courts have jurisdiction as aforesaid: *Provided*, That nothing herein contained shall prevent or impair the issuing and executing of separate writs of execution as heretofore, against all or any of such several apportionments.

SECT. 6. Every judgment heretofore obtained in any of said courts upon any apportioned claim filed in accordance with the above section, and those to which such section is a supplement, in cases where the amount of such judgment is less than that of which such Court has usual jurisdiction, and all writs of execution thereon had, shall be deemed good and valid; and any person or persons purchasing at any sale held in pursuance thereof, such property taken in execution, shall be and hereby is or are declared to have as full and indisputable title to such property so purchased as he or they would have if the judgment on which execution and sale was had had amounted to the sum of which such court has usual jurisdiction.

Act of January 23rd, 1849. Pamph. L., 686.

An Act relating to the lien of mechanics and others, and to sales to enforce the payment of liens.

SECT. 1. That the provisions of the twenty-ninth section of the Act of the sixteenth day of June, eighteen hundred and thirty-six, entitled "an Act relating to the lien of mechanics and others upon buildings," be and the same is hereby extended to the county of Chester; *Provided*, That nothing herein contained shall alter, impair or affect any contracts that shall have been made before the passage of this Act.

Act of March 24th, 1849, Pamph. L. 675.

A supplement to an Act entitled "An Act relating to the lien of mechanics and others upon buildings," passed the sixteenth day of June, Anno Domini one thousand eight hundred and thirty-six.

SECT. 1. That from and after the passage of this Act, the several provisions of the Act of Assembly passed the sixteenth day of June, in the year of our Lord one thousand eight hundred and thirty-six, entitled "An Act relating to the lien of mechanics and others upon buildings," be, and the same are hereby extended to plumbers within the county of Chester.

SECT. 2. That it shall be lawful for any mechanic or material man in the city or county of Philadelphia, and county of Chester, who performs work and furnishes materials, to include both in the same claim filed; and where the value or amount of the work or materials can only be ascertained by measurement when done, or shall be done by contract, for a stipulated sum, it shall be lawful to file a statement of the time when the work was commenced and when finished, and of the aggregate price of the work and materials, and all claims heretofore filed in conformity herewith, and not decided judicially, are hereby confirmed.

SECT. 3. That the several provisions of the Act to which this is a supplement, be and they are hereby extended to paper hangers.

Act of April 9th, 1849, Pamph. L. 495.

An Act relative to mechanics' liens in the counties of Westmoreland, Columbia and Elk.

SECT. 1. That the provisions of the Act entitled "An Act relating to the lien of mechanics and others upon buildings," passed the sixteenth day of June, one thousand eight hundred and thirty-six, be and the same is hereby extended to the counties of Westmoreland and Elk.

SECT. 2. The provisions of said Act are hereby further extended to every fixture in and about iron works and mines, and to every bridge and building where work is done or materials furnished in the construction of such fixture, in and about mines or iron works, bridge or building, for any corporate body, or for a contractor in the employment of a corporate body; and the process to obtain satisfaction of any judgment obtained upon such lien, in any case where by the existing laws no lien is given, for labour or materials done or furnished to a corporate body, shall be by writ of sequestration, as approved by the seventy-third section of the Act of sixteenth of June, one thousand eight hundred and thirty-six, entitled "An Act relating to executions;" *Provided*, That this Act shall not be construed to extend to any case in which work has been done or materials furnished before the passage of this Act, unless the lien is filed within six months after the last work is done or the last materials furnished: *And provided further*, That this section shall only extend to the counties of Columbia and Elk.

Act of April 25th, 1850. Pamph. L. 576.

An Act relating to the bail of executrixes; to partition in the Orphans' Court and Common Pleas; to coloured convicts in Philadelphia; to the limitation of actions against corporations; to actions enforcing the payment of ground rent; to trustees of married women; to appeals from awards of arbitrators by corporations; to hawkers and pedlers in the counties of Butler and Union; to the payment of costs in actions by informers in certain cases; to taxing lands situate in different townships; and in relation to fees of county

treasurers of Lycoming, Clinton and Schuylkill; to provide for recording the accounts of executors, administrators, guardians and auditor's reports; and to amend and alter existing laws relative to the administration of justice in this Commonwealth.

SECT. 38. That the several laws of this Commonwealth authorizing an apportionment of the amount due for materials furnished to two or more buildings owned by the same person, among the said buildings, shall extend to and shall authorize in similar cases an apportionment for work done, and for work done and materials furnished, where the same are furnished under one contract, as fully and in the same manner as is now authorized and allowed in the case of materials furnished.

Act of 26th April, 1850, Pamph. L. 612.

An Act to incorporate a company to build a plank road from Titusville in Crawford county, to Warren in Warren county; and relative to mechanics' liens and school districts in Carbon county; to the borough of Milton, in Northumberland county; to the elections in Franconia township; and the borough of Norristown; and to tax collectors in Montgomery county; and to the courts of Bucks county.

SECT. 9. That from and after the passage of this Act, the Act entitled, "An Act relating to the lien of mechanics and others upon buildings," passed the sixteenth day of June, one thousand eight hundred and thirty-six, shall be and the same is hereby extended and declared to be in full force and operation in the county of Carbon; and mechanics and others in said county, shall have like remedy under the said Act as though it was herein enacted and recited at full length.

Act of April 21st, 1854, Pamph. L. 428.

An Act relative to Mechanics' Liens in the County of Schuylkill.

SECT. 1. That the several provisions of an Act entitled "An Act relating to the lien of mechanics and others upon buildings," approved the sixteenth day of June, one thousand eight hundred and thirty-six, and the several supplements

thereto, are hereby extended to the improvements, machinery and fixtures erected by tenants of coal lease estates, on lands of others in the County of Schuylkill, and to all mechanics and material men doing work and furnishing materials therefor; *Provided*, That the lien hereby created, shall extend only to the interest of the tenant therein.

Act of April 14th, 1855, Pamph. L. 238.

A Supplement to an Act entitled "An Act relating to the Lien of Mechanics and others upon buildings," passed the sixteenth day of June, Anno Domini one thousand eight hundred and thirty-six.

SECT. 1. That from and after the passage of this Act, the several provisions of the Act to which this is a supplement be, and the same are hereby extended to plumbing, gas fitting and furnishing and erection of grates and furnaces.

SECT. 2. That whenever the items of a mechanic or material man's bill, for work done or materials furnished, continuously, towards the erection of any new building, are, in any part, *bona fide* within six months before the filing of the claim therefor, the lien shall be valid for the whole; and any lien heretofore filed within six months after furnishing the last item of a continuous bill, shall be good and valid, the same as if the whole bill were furnished within six months.

SECT. 3. That every claimant having a claim filed for work or materials, or both, who shall afterwards proceed to perform further work, or furnish other materials, or both, may make suggestions thereof on the same record, and filing a statement of the amount and particulars thereof, which may be recovered, with the original claim, under the writ, but if the original claim shall have been sued out, then a separate *scire facias* may be issued for the supplemental claim.

Act of April 26th, 1855, Pamph. L. 303.

A supplement to an Act, entitled "An Act relating to the liens of Mechanics and others, and to sales to enforce the payment of liens."

SECT. 1. That so much of the third section of the Act entitled "An Act relating to the lien of mechanics and others,

and sales to enforce the payment of liens," approved January twenty-third, one thousand eight hundred and forty-nine, as provides for the redemption, within one year, of property sold for registered taxes or municipal claims, is hereby declared and construed to extend and apply to all sales for liens or charges for the expenses of removing nuisances, and that this is and shall be taken to be the true intent and meaning of the aforesaid section of the said Act.

Act of April 21st, 1856, Pamph. L. 496.

A further Supplement to an Act relating to the Lien of Mechanics and others upon buildings, passed the sixteenth day of June, Anno Domini, eighteen hundred and thirty-six.

SECT. 1. That from and after the passage of this Act, the provisions of the Act entitled "An Act relating to the lien of mechanics and others, upon buildings," passed the 16th day of June, Anno Domini 1836, and the supplements thereto, be, and the same are hereby extended, as fully as the same are now applicable to buildings, to every steam engine, coal breaker or parts thereof, pump gearing, hoisting gearing, fixture or machinery in and about mills of any kind, iron or coal works, coal mines and iron mines.

FORMS.

I.

THE SEVERAL CLAIMS.

A. B.	In the Court	
vs.	for County	
C. D. owner,[1]	of the Term of	185
E. F. contractor.	No.	

A. B.[2] of the county of , carpenter,[3] who is entitled to the benefit of the provisions of the Act of assembly passed the 16th day of June, 1836, entitled "An Act relating to the lien of mechanics and others upon buildings," and the several supplements thereto, in respect to the lien and remedy thereby given for the payment of a debt due to him, contracted for work done,[4] by him, for and about the erection and construction, and upon the credit of a building[5] erected within said county, hereinafter more particularly described; in compliance with said provisions, sets forth, in this claim or statement of his demand, as follows, viz.:

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[1] If the owner cannot be ascertained with certainty, insert the name of one who is believed and reputed to be the owner, calling him "reputed owner." If the same person is both owner and contractor, call him "owner and contractor."

[2] If several persons have a joint claim, state all their names; and, if they be partners, their partnership name.

[3] It appears not to be necessary to state the claimant's trade or occupation, but it is safer to do so.

[4] If the claim be for "materials furnished," or for both "work done and materials furnished," so express it, here.

[5] This averment does not appear to be absolutely essential, but it is, perhaps, safest.

The said C. D. was the owner[1] of said building at the time the same was commenced;[2] and the said E. F.[3] was the contractor, architect or builder, at whose instance said work was done, and with whom the contract of the said A. B. therefor, was made.[4]

The amount claimed to be due to him, the said A. B. is dollars and cents.[5] This sum is due for carpenter's work[6] done by the said A. B., for and about the erection and construction of said building.[7] The statement hereto annexed, as part hereof, sets forth particularly the nature and kind of the work done,[8] and the time when the same was done.[9]

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[1] If no certainty can be reached, say "reputed owner."

[2] There is a want of positiveness in the decisions, but it appears to be safer to make the owner, at that time, a defendant. If he was, also, owner when the work was done, add such a statement, and, if he still continues the owner, it may be well to insert that, also.

[3] If the owner was, also, contractor, the words "the said E. F. was," should be omitted.

[4] It appears to be proper under the present decisions, that the subcontractor be made the defendant, and mentioned here, if the claimant's contract were with him, directly.

[5] This may be larger than the sum proved, but, if it be less, no more can be recovered.

[6] If for materials, say, "materials furnished," designating the kind of materials. If, for "work done, and materials furnished," so express it; designating the kind of work, and materials.

[7] If part of the work was done upon out-houses, fences, sheds, &c., it appears to be safer to designate them specifically; and not to add the words often added here, "with the appurtenances." Thus, "and, also, of a certain privy, appurtenant thereto, built upon ground immediately adjacent thereto, belonging in like manner to the owner of said building, and necessary for the ordinary and useful purposes thereof."

[8] Or "the kind and amount of materials furnished, and the time when they were furnished;" or "the nature and kind of the work done, and the kind and amount of materials furnished, and the time when the materials were furnished, and the work was done."

[9] If the work is done or the materials are furnished, under a gross contract, this reference to a statement annexed may be omitted. The averment in such a case after the word "building," should be thus: "under and in pursuance of a written contract or agreement with said E. F. a copy of which is hereto annexed," or, "under and in pursuance of a parol contract

Said building is a dwelling-house[1] of stories, having a front of feet, and a depth of feet, and storied back buildings feet deep, by broad,[2] situate upon a certain lot or piece of land within the county of &c.[3]

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or agreement, between the said A. B. and E. F., made on or about the day of , last, in substance, as follows, viz.:—The claim should then proceed to aver as follows: "which work was done (or materials were furnished, or work was done and materials were furnished) under and in pursuance of said contract or agreement, between the day of and the day of last past." This last date must be within six months from the time of filing the claim.

In case the statement be appended, it is a very important part of the claim, and should be drawn by counsel, with great care. It need not accord, exactly with the entries in the claimant's book, if any, though it should conform to them, as nearly as is consistent with safety. If the work is by the day, the dates, and nature and the price or value of every day's work, should, if possible, be given. If by pieces or jobs, the day of beginning and completing each piece or job should be set forth, and its nature, with the contract, or *quantum meruit*, price or value of the same by measurement or otherwise. If the claim be for materials, their kind or nature should be given, and the date, quantity or amount and value of each lot delivered.

If any part of the work has been done, or materials furnished, more than six months before filing the claim, it should be connected with that done or furnished within the six months, by an averment, that all were done or furnished under one continuing contract, or were done or furnished "continuously."

The statement should, in respect of date, nature and kind, quantity or amount, and price or value, carefully distinguish work from materials; unless they can only be ascertained by measurement, together, or are done, together, under one contract. In such cases, a statement of the time when the work was begun and finished, and of the aggregate price of both work and materials, is allowed by Act of Assembly; at least, in the counties of Philadelphia and Chester.

[1] The character or object of the building, may be important.

[2] If part of the work has been done upon out buildings, or appurtenances, it would be better, perhaps, to mention and describe them.

[3] Great accuracy and particularity are not required in these averments; but it is best to describe the lot, which is alleged to be bound, as particularly, if possible, as in a deed; by streets, courses, distances, and boundaries. If the proceeding to designate the boundaries, contemplated by the Act, has been had, of course there will be no difficulty or danger. If it has not been had, the claimant must exercise care, in including what is covered by the building, and so much other ground, immediately adjacent

And the said A. B. now here in the manner and form, and within the time designated by said Act, and according to the provision, thereof, files this claim or statement of his demand, for the purposes and objects of said Act and its supplements, and to have and obtain the full lien, remedy, force and effect therein provided for the payment of said debt against said building, and the ground covered thereby, and so much other ground immediately adjacent thereto, and belonging, in like manner, to the owner of such building, as may be necessary for the ordinary and useful purposes thereof, from the commencement of the said building.

II.

THE JOINT APPORTIONED CLAIM.

(*Entitled as the last.*)

A. B. of the county of , lumber merchant, who is entitled to the benefit of the provisions of the Act of Assembly, passed the 16th day of June, 1836, entitled "An Act relating to the lien of mechanics and others upon buildings," and the several supplements thereto, in respect to the lien and remedy for the payment of a debt due to him, contracted for materials furnished[1] by him for and about the erection and construction of several buildings adjoining each other, erected within said county, hereinafter more particularly described; in compliance with said provision, sets forth, in this his claim or statement of his demand, as follows, viz.:

The said C. D. was the owner of said buildings, at the time when the same were commenced, and the said E. F. was the

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thereto, and belonging, in like manner, to the owner of the building, as may be necessary for the ordinary and useful purposes of such building. In a city this is not difficult, and objection is seldom made to the metes and bounds designated in the claim, or in the *levari facias*. If the claimant includes less, in his claim, than he might have included, he cannot sell more; but, if he includes too much, he will, probably, be only narrowed or confined to what is, in the regular way, ascertained to be bound by his lien.

[1] The Act of 1850 authorizes an apportionment "for work done and for work done and materials furnished, where the same are furnished under one contract."

contractor, architect, or builder, at whose instance said work was done, and with whom the contract of the said A. B. therefor was made.

The amount claimed to be due to him, the said A. B. is dollars and cents. This sum is due for lumber furnished by the said A. B., for and about the erection and construction of said buildings. The statement hereto annexed as part hereof, sets forth particularly the kind and amount of the said materials furnished, and the time when the same were furnished.

Said several adjoining buildings, are dwelling-houses, of stories, &c., &c., &c., &c., situate one of them on a certain lot or piece of land within said county of &c. another of them, &c.

And the said A. B. hereby designates the amount which he claims to be due to him on each of said buildings, as follows, viz. He designates the sum of to be due to him on said building first herein above described, &c. He designates the sum of to be due to him on said building second herein above described.

And the said A. B., now, here, in the manner and form, and within the time designated by said Act, and supplements, and according to the provisions thereof, files this claim or statement of his demand, for the purposes and objects of said Act and supplements, and to have and obtain the full lien, remedy, force and effect, therein provided, for the payment of said debt, against said several buildings, and the ground respectively covered thereby, and so much other ground immediately adjacent to them, respectively, and belonging, in like manner, to the owner of such building, as may be necessary to the ordinary and useful purposes thereof respectively, from the commencement of said building.[1]

III.

THE SCIRE FACIAS.

A form of this writ is given in section 15, *of the Act of* 1836.

[1] The notes to the first claim, generally, apply to this claim.

IV.

PETITION UNDER THE 23RD SECTION OF THE ACT OF 1836.

Entitled as of the Term and No. of the lien.

To the Honourable, the Judges of the Court for the of

The petition of C. D.[1] respectfully showeth: that on the day of 185 , to term of this court, No. A. B. filed an alleged claim under the Act entitled "An Act relating to the lien of Mechanics and others upon buildings," passed the 16th of June, 1836, and the several supplements thereto, against a certain building and lot or piece of ground of which your petitioner is the owner;[2] that your petitioner denies the validity of said claim, and has a just and legal defence thereto;[3] but no opportunity has been given to him to assert said invalidity, with effect, or to make said defence, no *scire facias* having been issued thereon.

Your petitioner therefore prays this Honourable court, according to the Act in such case provided, to grant a rule upon the said A. B. to appear before your Honours, at a time to be fixed for such purpose, and that, on the return of said rule, your petitioner may proceed, in like manner as if a *scire facias* had been issued by such claimant, and had been duly served and returned.

And your petitioner will ever pray, &c.

V.

FORM OF THE RULE ON THE ABOVE PETITION.

Entitled as of the term and No. of the lien.

And now the petition of C. D. this day filed, being heard, the court grant a rule on the said A. B. returna-

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[1] The owner or any person interested in the building.

[2] Or, if not owner, but otherwise interested, state the nature of the interest.

[3] The Act requires the petition to set forth the facts. It would, perhaps be safer, therefore, to state the ground of objection, or defence.

ble on to show cause why the petitioner should not proceed in like manner as if a *scire facias* had been issued, according to the Act in such case provided.

VI.

ORDER OF THE COURT UPON THE ABOVE PETITION.

That in this case, the plaintiff shall file a statement or declaration, upon the contract under which the said work was done, stating the same particularly; if any special contract were made, annexing thereto, as a part thereof, a bill of the items or particulars of the demand, as fully as they appear upon the plaintiff's book of entries, if any such are intended to be offered in evidence on the trial; and if no such entries are to be offered, then the said bill shall state particularly the dates or times at which said work and labour were performed. And the court further direct, that the defendant allege, particularly, his defence to such parts of the plaintiff's statement, or to such item of his bill of particulars, specifying the same, as he intends to dispute; and neither party shall be allowed on the trial to allege or prove any matter or thing not contained in the statement or bill of particulars, exception, or defence. The plaintiff to comply with this order on or before the 7th day of June, 1837, or, in default thereof, judgment of non. pros. to be entered and the claim to be stricken from the record.[1]

VII.

PLAINTIFF'S STATEMENT UNDER SAID ORDER.[2]

VIII.

DEFENDANT'S ALLEGATIONS IN DEFENCE UNDER SAID ORDER.[2]

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[1] See Borton *v.* Morris, 2 M. 109.

[2] These depend so entirely upon the circumstances of each case that we must leave them to the ordinary rules of statements and declarations, and the peculiar terms of the order.

IX.

ENTRY OF THE SUGGESTION UNDER THE 19TH SECTION.

Entitled as of the scire facias already issued.

On the day of &c., came E. F. into the said court, and suggested that he, the said E. F., on the day of &c., filed in the said court, according to the form of the Act of Assembly in such case made and provided, a claim against the building described in the said writ of *scire facias*, and against the said C. D. as owner of the said building, (*or as reputed owner, as the case may be*,) and against G. H. as contractor, &c., (*according to the fact*,) for work and labour (*or for materials furnished, &c., as the case may be*,) as follows, to wit: (*here set out fully a copy of the claim filed*,) as appears of record. And thereupon the said E. F. asked leave of the court that his said suggestion might be entered upon record in the said cause, together with the particulars of his said claim, which was allowed. And thereupon, on motion of the said E. F. by J. K. his attorney, a rule was granted upon the said C. D. to appear and plead to the said suggestion, on ten days' notice of the said rule and suggestion, or show cause why he should not, or in default thereof, that judgment be entered against him for want of a plea.[1]

X.

THE LEVARI FACIAS.

A form of this writ is given in the 21st section of the Act of 1836.

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[1] See Noyes *v.* Fritz, 2 M. 162.

INDEX.

ABATEMENT.

That one of two contractors is not named, is pleadable in, 209, 274.

ACTION.

Act of 1803, provided for, as mode of recovering debt, 219.
No provision as to form of, 219.
Probably special, intended, 220.
Taking a bond and warrant is not, 220.
Assumpsit against contractor is not, 220.
Personal, 312.

ACTS OF ASSEMBLY.

Act of 1784, relating to persons employed on vessels, &c., 33.
Similar to Mechanics' lien laws, 33.
Early Acts imperfect, 34.
Acts extending the system locally, 48, &c.
Act of 1803, whether retrospective, 41.
Confined to city of Philadelphia, Southwark and Northern Liberties, 48.
Makes provision only for case in which owner is debtor, 61, 125.
Words of, in defining debt, 83.
Names the classes to which it applies, 113.
Estates affected by, 151.
Commencement of lien under, 166.
Continuance of lien under, 172, 179, 181.
No provision in, as to form of claim or parties to it, 204.
Requires a claim, 219.
Contemplates an action, 262.
Act of 1806, how it differs from that of 1784, 32.
Followed by Congress, 36.
Confined to City and County of Philadelphia, 36, 48.
First provides for case in which owner is not debtor, 61, 63, 125.

ACTS OF ASSEMBLY—*Continued.*
Did not allow journeymen, &c., to claim, 77.
Does not only include regular tradesmen, 81.
Words of, in defining debt, 83.
Names the classes to which it applies, 113.
Did not include paper-hangers, &c., 114.
Extent of lien under, 138.
Estate affected by, 151, &c.
Commencement of lien under, 166.
Continuance of lien under, 172, 179, 181, 183.
Effect under, of taking judgment bond, 189.
No provision in, as to form of claim or parties, 204, 205.
Provision of, requiring a claim, 219.
Action contemplated by, 262.
Requires *pro rata* payments of proceeds of sale, 301.
Act of 1808, followed by Congress, 36.
Extended Act of 1806 to boroughs of Erie, Lancaster and Pittsburgh, 48.
Provides for contractor, under name of debtor, 62.
Estate affected by, 151, &c.
Effect under, of taking judgment bond, 190.
Provision of, as to parties to *scire facias*, 207, 210.
Construction of, as to joint claims, 249.
First Act that mentions a *scire facias*, 262.
As to service of *scire facias*, under, 262.
Confines execution to the building, 297.
Act of 1813, extends Acts to borough of Beaver, 48.
Act of 1815, extends Acts to borough of Marietta and Harrisburgh, 48.
Act of 1817, extends Acts to boroughs of Reading, and Westchester, and towns of Alleghany, Birmingham, Sydneyville, Belinstown, Bayardstown, Lawrenceville and Wilkinsburgh, &c., and to counties of Lancaster, Montgomery, York, Dauphin, Franklin and Lebanon, 49.
Act of 1818, extends Acts to Cumberland, Northumberland, Columbia and Beaver, 49.
Act of 1821, extends Acts to Delaware, Bucks, Luzerne, and Mifflin, 50.
Act of 1825, extends Acts to Schuylkill, Berks, Erie, Somerset, and Venango, 50.
Act of 1826, extends Acts to Crawford, Lycoming, Centre, Clearfield and Indiana, 50.
Act of 1827, extends Acts to Union, 50.
Act of 1830, extends Acts to borough of Easton, 50.
Does not save mechanics' liens, 187.
Act of 1831, extends Acts to Bedford, Cambria, Tioga and Armstrong, 50.
Extends Acts to plumbers, in Philadelphia, 115.
Continuance of lien under, 181.

ACTS OF ASSEMBLY—*Continued.*
Provision of, as to apportionment, 252.
Act of 1832, extends Acts to Chester, Butler and Perry, 50.
Act of 1835, extends Acts to Warren, Juniata, Washington, Huntingdon, Mercer, Beaver and Alleghany, 50.
Act of April 1, 1836, extends Acts to Susquehanna, 50.
Act of June 16, 1836, is the most perfect, 35.
Not retrospective, 41.
Extended over whole state, as it came from Commissioners, 51.
Does not include classes not included by Act of 1803, 77, 78.
Embodied fruits of former experience, 39.
Whether retrospective, 41, 43.
Construed by Act of 1840, 44, 45.
Extent of, 51, 52.
Extended to Lehigh, 52.
List of counties included in, 53.
Extended to plumbers and persons furnishing curbstone, 54, 101, 116.
Mentions contractor, 62, 125.
Does not embrace journeymen, &c., 77.
Does not only include regular tradesmen, 82.
Words of, in defining debt, 83.
Form of *scire facias* in, 89.
Construction of, as to extent of lien, &c., 90, 93.
What classes can claim under, 115.
Does not name particular mechanics, 117.
Commissioners' report on, as to extent of lien, 140, &c.
Extent of lien under, 144.
Mode of designating boundaries under, 144, &c.
Estate affected by, 151, &c.
Commencement of lien under, 166.
Continuance of lien under, 172, 179, 181.
Postponement under, on failure to apportion, 185.
Courts having jurisdiction under, 202.
Provision in, as to parties to claim, &c., 204, 208, &c.
Provision in, as to form of claim, 222.
Apportionment under, 252, &c.
Provides for *scire facias*, 262, &c.
As to service of *scire facias*, under, 264.
Provision in, requiring advertisement repealed, 264.
Provision in, compelling claimant to proceed, 267.
Provision in, as to coming in by suggestion, 270.
As to judgments for want of affidavit of defence, 272.
Provides *levari facias*, 299.
Provides mode of designating premises, 300.
Provides mode of distributing proceeds, 304.
Personal remedy under, 312.

ACTS OF ASSEMBLY—*Continued.*
Act of 1838, extends early Acts to Bradford, 52.
Repealed in 1842, 52.
Extends Acts to wharf builders, 86.
Act of 1840, extends Acts to Wayne and Fayette, 52.
Limits estate affected, 35, 88, 93, 154, &c., 160.
What case produced it, 90, 129.
Whether retrospective or not, 41, &c.
Act of 1841, extends Acts to Clinton, Clarion and M'Kean, 52.
Act of 1842, extends Acts to Bradford, Monroe, Greene and Dauphin, 52.
Repeals part of Act of 1836, requiring advertisements, 264.
Regulates judgment for want of affidavit of defendant, 272.
Act of 1843, extends Acts to Potter and Jefferson, 53.
Extends Acts to plumbers in Northampton, 54, 116.
Act of 1844, extends Acts to Northampton, 53, 54.
Extends Acts to plumbers and furnishers of curbstones, in Lancaster, 55, 116.
Act of 1845, allows a lien in case of special contract, 36.
Whether retrospective, or not, 46.
Annuls previous decisions, 69, &c.
Does not include journeymen, 78.
What case led to its passage, 123.
Acts of 1846, extend Acts to Pike and Adams, 53.
Act of 1848, gives District Courts of Philadelphia, Lancaster, &c., jurisdiction over apportioned claims under $100, 203.
Requires several executions in cases of apportionment, 301.
Act of 1849, extends Acts to Westmoreland and Elk, 53.
Extends Acts to plumbers, &c., in Chester, 54, 117.
Extends Acts to fixtures, &c., about iron works, &c., in Columbia and Elk, 55, 86.
Allows work and materials to be embraced in Philadelphia and Chester, 55, 226, 236.
Extends Acts to paper hangers, 116.
As to exemption of $300, does not apply, 186.
Act of 1850, extends Acts to Carbon, 53.
Allows apportionment of *work*, 254.
Act of 1854, extends Acts to coal lease estates in Schuylkill, 55, 87, 93.
Enlarges jurisdiction of Common Pleas of Philadelphia, 202.
Act of 1855, as to continuous work, &c., of which part is more than six months old, &c., 175.
Allows a suggestion to bring in subsequent work, 271.
Provides for judgment for want of affidavit of defence, 272.
Act of 1856, extends Acts to fixtures about mills, iron and coal works, and mines, 87.

ADAMS.
Acts extended to, 53.

ADDITION.
What is only, 101.
Slight work, after interval or sheriff's sale in, 170.
Not a subject of lien, 101, 170.

ADJOINING.
What houses are, with reference to apportionment, 256, &c.

ADMINISTRATOR.
No judgment against, for want of affidavit of defence, 273.

ADVERSE TITLE.
Not affected by lien, 302, 303.

ADVERTISING.
Act requiring service of *scire facias* by, repealed, 264.

AFFIDAVIT.
Of defence, judgment for want of, 272.

AGENT.
How far contractor is, for owner, 125, 313.

AGREEMENT. See CONTRACT.

ALDERMAN.
Has no jurisdiction under Acts, 203.

ALLEGHANY.
Acts extended to town of, 48, 49, 50.

ALTERATION.
When work is a mere, 101.

AMOUNT.
For which claim may be filed, no limit to, 163.
Generally filed for greater, than due, 163.

APPORTIONMENT. See JOINT CLAIMS.
Different commencement in cases of, 170.
Failure to make, postpones, 185, 259.
To all lien creditors, 185.
Does judgment cure?, 185.
Jurisdiction of courts in cases of, 203.
In case of houses owned by same person, 249.
Where owners different, 249.
Option as to, 249, 250.
Acts of 1831 and 1836, as to, 252.
Under them only in case of materials, 252.

APPORTIONMENT—*Continued.*
Act of 1850, as to, includes work, &c., 254.
Houses must adjoin for, 256, &c.
Main house and out-houses not a case for, 258.
Effect of change of ownership as to, 259.

APPROPRIATION.
Of payments, 193.

APPURTENANCES.
What are within Acts, 95.
As regards character of, as fixtures or not, 95.
As regards distance of, from building, 97.
Must they be described in claim?, 245.

ARMSTRONG.
Acts extended to, 50.

AUDITOR. See DISTRIBUTION.

BARN.
A building within the Acts, 84, 85, 97.
What extent of ground goes with, 138, 147.

BATH-HOUSE.
When within Acts, 99.

BAYARDSTOWN.
Acts extended to, 49.

BEAVER.
Acts extended to, 48, 49, 50.

BEDFORD.
Acts extended to, 50.

BELINSTOWN.
Acts extended to, 49.

BILL
Annexed to claim, part of it, 225, 246.
But should be referred to in it, 225.

BIRMINGHAM.
Acts extended to, 49.

BLACKSMITH.
Mentioned in Acts of 1803 and 1806, 113.

BLOCK,
Of houses, what is, 256.

BOILER
In engine house, is within Acts, 84.
In brew-house, is within Acts, 95.

BOND.
Taking, does not prevent lien, 121.
Taking, does not discharge lien, 189.

BOOKS.
Entries in, best proof of credit to building, 280, &c.

BOUNDARIES
Of land affected by lien, how ascertained, 144, &c.
Not often ascertained under Act, 148.
How ascertained, for *levari facias*, 299.

BRADFORD.
Acts extended to, 52.

BREWERY
Is a building within the Acts, 84.

BRICKLAYER
Is mentioned in Acts of 1803 and 1806, 113.

BRICKMAKER
Is mentioned in Acts of 1803 and 1806, 113.

BRIDGES.
Acts extended to, 55.

BUCKS.
Acts extended to, 50.

BUILDING.
Term more comprehensive than house, 83.
Term used, alone, in Act of 1836, 83.
Church is a, 83, &c.
Public, not within Acts, 86.
What are, within Act, 84.
Lien not confined to, only, 135.

BURNING
Down of house, discharges premises from lien, 199.

BUTLER.
Acts extended to, 50.

CAMBRIA.
Acts extended to, 50.

CARBON.
Acts extended to, 53.

CARPENTER
Is mentioned in Act of 1803, 113.

CARTER
Has no lien, 76.

CENTRE.
Acts extended to, 50.

CERTIFICATE,
For defendant not allowed, 297.

CHANGE
Of plan, does not make a new commencement, 168.
Unless, after a long interval, 168, 169.

CHATTELS REAL
Are not within Acts, 87, &c.

CHESTER.
Acts extended to, 50.
Acts extended to plumbers in, 54.
29th section of Act of 1836, extended to, 55.

CLAIM.
Early Acts imperfect in regard to, 34, 204.
Liberality as to form of, 38, 40, 164, 219.
But must, substantially, comply with Acts, 39.
Has no aid from statute of *jeofails*, 40.
Not amendable, 40, 248.
Insufficient notice from, 164.
If defective, another may be filed, within time, 179, 246, &c.
Necessary to a continuance of lien, after six months, 179.
Must be filed within that time, 179.
Parties to, 204, &c.
Name of claimant in, must be mentioned, 204.
Whether owner and contractor must be named in, 205, &c., 210, 212.
Mistakes as to parties in, how far fatal, 207, 225.
Filing of, if *ex parte*, 221.
Is not a record, 221, 246.
Is like registry of mortgage, 221.
Forms of, various, 222.
Design of, is to give notice, 222.
What it must set forth, under Act of 1836, 222.

CLAIM—*Continued.*
Name of claimant in, 223.
If partners either individual names or firm name in, 224.
Name of owner at commencement in, 224.
Titles, as owner or contractor in not necessary, 224, 225.
Nature or kind of work and materials, 225.
May be set forth in a bill annexed, 225, 246.
But bill should be referred to in, 225.
Work and materials may be included in same, 226.
But must be distinguished, 226.
Unless both done by contract, or only ascertainable by measurement, 122, 126, &c.
Then must set forth beginning and end of work, and aggregate price of materials, 227.
This under Act of 1849, which applies to Philadelphia and Chester, 226.
How the kind and amount, &c., are to be set forth in, 227, &c.
Must set forth time when work done and materials furnished, 228.
How this time is to be set forth in, 228, &c.
How in case of special contract, 237.
Special contract need not be referred to in, 239.
Locality and size, &c., of building in, 240.
License as to these in, 240, 241.
Description by metes and bounds in unnecessary, 240.
But, perhaps, better to be in, if can be ascertained, certainly, 241.
Safer to include too much, than too little in, 240.
License in stating locality in, 242, &c.
Size and number of stories, 245.
Necessity of setting forth character of building in, 245.
Must appurtenances be described in? 245.
Must a credit to the building be alleged in? 246.
Need not state work done "for or about erection," &c., 246.
May be signed by counsel, 246.
Is not evidence, 280.
See STRIKING OFF.
See JOINT CLAIMS.
See PARTIES.

CLAIMANT.
Must be mentioned in claim, 204, 223.
And in *scire facias*, 205.
See CLAIM.

CLARION.
Acts extended to, 52.

CLEARFIELD.
Acts extended to, 50.

CLINTON.
Acts extended to, 52.

COAL BREAKER.
Acts extended to, 87.

COAL LEASE ESTATES.
Acts extended to improvements on, 55, 87, 93.

COAL MINES.
Acts extended to fixtures and machinery of, 87.

COAL WORKS.
Acts extended to fixtures and machinery of, 87.

COLUMBIA.
Acts extended to, 49.
Acts extended to iron works, &c., in, 55.

COMING IN
By suggestion, 270.
Mode of, 271.
Of mortgagee to defend, 217.

COMMENCEMENT
Of lien, 166, &c.
Is with first work, 166.
Digging foundation is, 166.
Or laying first stone, or timber, 166.
Change of ownership does not make new, 166.
Nor changing plan, 168.
Unless change is made after a long interval, 169.
Sheriff's sale makes a new, if there is a building after, 169.
Not a new, if work trivial, 170.
Then it is extra work, for which no lien, 170.
Different, in cases of apportionment, 170.
Unless all the houses began together, 170.
Time of, is not specified in claim, 184.
Is a subject of proof before auditor, 185.
Need not be proved at trial, 279.

COMMON PLEAS.
Jurisdiction of, 202.
Of Philadelphia, jurisdiction of, 202.

COMPELLING
Claimant to proceed, 267.
Practice in, 268.

CONSTITUTIONAL QUESTION,
As to retrospective character of Acts, 40.

CONSTRUCTION.
Strict because proceeding statutory, 37.
Only strict as to new applications of laws, 37.
Semble, not as to procedure, 37.
Liberal, as to forms of claims, 38, 39.
Dangers of too great license in, 38, 40.
As to retrospective character of Acts, 41, 42, &c.

CONTINUANCE
Of lien was, at first, for two years, 172.
Was without claim, 172.
For six months, by Act of 1836, 172.
From time of finishing work, or furnishing materials, 172.
How six months of, calculated, 172.
Question for jury with reference to, when work finished or materials furnished, &c., 172.
Distinct debts, with reference to, if interval between different works or deliveries, 173.
Six months of, run from each item, 173, &c.
Except in cases of contract, 175, &c.
Act of 1855 saves as to, what is older than six months, 175.
If done continuously with what is within the time, 175.
Treated as extra work, if not continuous and no contract, 177.
Not affected by defective claim, if time not elapsed, 179.
Not more than six months, without claim, 179.
Claim must be filed for, within that time, 179.
Indefinite, under first Acts, 181.
Five years after claim, new, 181.
By *scire facias*, every five years, 181.
Though five years elapse before judgment on the *scire facias*, 182.
Without revival against proceeds, 183.

CONTRACT,
Is not impaired by Act of 1840, only remedy, 42, &c.
Must have been with owner, at first, 125.
Not under later Acts, 125.
In case of, work and materials in same claim, 226.
What averments in claim, as to, 226.
Need not be referred to, in claim, 239.
With head contractor effect of, as to mechanics, 283.
See SPECIAL CONTRACT.

CONTRACTOR.
Losses by, led to the system, 34.
Who he is, 60.

CONTRACTOR—*Continued.*
Not recognised by Act of 1803, 60, 125.
Existence of, prevented the lien, 60, 61.
How far agent for owner, 61, 125.
Called "debtor," in Act of 1808, 62.
First so called by Act of 1836, 62.
Made important party, 62.
But known in the proceeding, before 1836, 62.
Held not to be entitled to a lien, 63, &c.
Reasons for excluding him, 67.
Not excluded on ground of contract merely, 67, 68.
Has a lien by Act of 1845, 69.
Has no lien against those he employs, 70.
For he is their debtor, 70.
His contract limits claims of others, 72, 73, &c.
Non-joinder of one of, matter of abatement, 209, 274.
Not a witness for owner, 292.
Is witness for claimant, 293.
Is witness before Auditor, 293.
See Sub-contractor.
See Parties.

COPY.
None filed to take judgment, 272.

CORPORATION.
Acts extended to mines, iron works, bridges and buildings of, 55.

COSTS.
Cannot proceed for, after a sale, 164, 200, 310.
Are payable out of proceeds of sales, 310.

COUNTIES.
No provision where lands lie in two, 202.
List of, to which Acts extend, 53.

COURTS.
See Jurisdiction.
See District Court.
See Common Pleas.
See Law and Fact.

CRAWFORD.
Acts extended to, 50.

CREDIT.
Work or furnishing must be on, of house, 117.
Must this be averred in claim? 246.
Proof of, to house, 283, &c.

CREDITORS
Should be protected by notice from claim, 39.

CUMBERLAND.
Acts extended to, 49.

CURBSTONE.
Acts extended to furnishers of, in Philadelphia, 54, 101, 116.
And in Chester, 54, 117.
And in Lancaster, 55.

DAUPHIN.
Acts extended to, 48, 49, 52.

DAY LABOURER
Has no lien, 76.

DEBT.
Nature of, secured by the lien, 83, &c.

DECLARATION.
Scire facias is, 274.

DEFENCE.
Mortgagee may take, 217.

DELAWARE.
Acts extended to, 50.

DEMURRER
To claim good, 260, 274.
For variance, 275.

DESCRIPTION
Of land subject to lien, how ascertained, 144, &c.
License as to, 148, &c.
Advantage of fulness in, 149.
How obtained, for *levari facias*, 299, &c.

DESIGNATION
Of amounts in cases of apportionment, 249.
Of boundaries, see BOUNDARIES.

DIFFERENT COUNTIES.
No provision made where lands lie in, 202.

DISCHARGE
Of lien, by release, if delivered, 188.
Taking security not a, 188, 9.
Taking note, bond, or judgment not a, 189.
But time given to contractor is, 191.

DISCHARGE—*Continued.*
By estoppel, 197.
By sheriff's sale, 197.
By burning of house, 197.
Not by tearing it down, 199.

DISCONTINUANCE.
New *scire facias* in case of, 264.

DISTILLERY
Is a building within the Acts, 84.

DISTRIBUTION
Of proceeds of sheriff's sales, 304.
Auditor usually makes, 305.
Who may object, in case of, 305.
Issue in, if necessary, 306.

DISTRICT COURT
Of Philadelphia, jurisdiction of, 202, 203.
Of Lancaster and Allegheny, 203.

EASTON.
Acts extended to, 50, 54.

ELK.
Acts extended to, 53.
Acts extended to iron works, &c., 55.

ENGINE HOUSE
Is a building, within the Acts, 84.

EQUITABLE ESTATE.
See Estate.

ERECTION AND CONSTRUCTION.
What is, 101, &c.
When they are a mere addition, 101, &c.

ERIE.
Acts extended to, 48.

ESTATE
In fee formerly bound, 35, 150, &c.
Though building were by tenants for life, or owner of equitable estates, 35, 150, &c.
This changed by Act of 1840, 35, 160.
Lien confined by it to, of person in possession, &c., 35, 160.
For years, not within Acts, since 1840, 87, 88, &c.
Of coal lease, improvements on, 55, 87.
Owner of what, can pledge credit of building bound, 128, 150, &c.

ESTATE—*Continued.*
Formerly, of any one in possession who built, 129, 150, &c.
Of tenant for life, owner of equity, &c., 129, 150, &c.
Not of trespasser, 129.
Nor of Insurance Company, building under policy, 130, 159.
Act of 1840 has changed this, 129.
Where legal, acquired, relation back, 161.
Right of lessee to purchase in fee, effect of, as to, 161.

ESTOPPEL.
Lien discharged by, 197.

EVIDENCE
On trial of *scire facias*, 279.
Of facts of erection, &c., 279.
Of commencement, unnecessary, 279.
Of names and characters of parties, and their relations, 279.
Of contract of chief contractor, 280.
Of doing work or furnishing materials, 280.
Claim is not, 280.
Books of original entry, when, 280.
Allegata and *probata*, 280, &c.
How far variance of, fatal, 281.
To supply omissions and correct mistakes, 281.
As to amount, need not correspond, exactly, 281, 282.
Of time, 282.
As to locality, how far may vary, 282, 283.
Of special contract, must be given, 283.
Of contract by contractor, how far binds owner, 283.
Of credit to building, 283, &c.
Best, of credit, is charge to house on books, 283, 284, &c.
But entry on books not necessary as, 286.
Other, allowed, 286.
Of work on house, 286.
Or of delivery at, 286.
Of use in, 286.
Of actual use, not indispensable, 287.
Showing fraud, 289.
As, of knowledge, that more than enough is furnished, 289.
Or, of delivery at inconsistent time, 292.
Of special contract, effect of, 292.
Of note, bond, or security, 292.
Of filing within six months, 292.
See Witness.

EXECUTION.
Materials not subject to, against contractor, 132.
Form of given in Act, 299.

EXECUTION—*Continued.*
By *levari facias*, 299.
Description for, how obtained, 299.
Several, in case of apportionment, 300.

EXEMPTION ACT.
Mechanic's liens not affected by, 186, 303.

EX POST FACTO
Construction, danger of, 41, 42.

EXTENT
Of the Acts has increased, 36.
Is now over almost the whole state, 36.
Of lien, as respects ground, 135, &c.
Not confined to house, 135, &c.
Nor to ground covered by house, 135, &c.
Reaches to other ground necessary and useful, 144.
See report of Commissioners as to, 140, &c.
Mode of ascertaining, under Act, 144.

EXTRA WORK
Is not a subject of lien, 170.
What is, 177.

FACT.
See LAW AND FACT.
See JURY.

FACTORY
Is a building within the Acts, 84.

FAYETTE.
Acts extended to, 52.

FEE SIMPLE.
See ESTATE.

FENCE.
Whether within Acts, 100.

FILING.
See CLAIM.

FINISHING
Work, what is, 173, &c.
Time of, is question for jury, 172.
Each distinct, a separate debt, 173.
Where work is done under one contract, 175, &c.
Where work is done continuously, under Act of 1855, 175.
Extra work not a, 177.

FIRE
Discharges lien when, 197.

FIXTURES
Of coal lease estates, Acts extended to, 55.
About iron works, and mines, 55.
What about a building, are within Acts, 95, &c.

"FOR OR ABOUT."
When work is done, or materials furnished, 120.

FORMER RECOVERY
Is a defence, 278.

FOUNDATION.
Digging, is commencement, 166.

FRANKLIN.
Acts extended to, 49.

FRAUD
In furnishing, a defence, 289, &c.
As, in case of knowledge that too much is furnished, 289.

FURNACE
Is a building within the Acts, 84, 97.
Those furnishing, have lien, 117.

FURNISHING
Materials, what is, 173.
Time of, question for a jury, 172.
Each, a distinct debt, 173.
Except in cases of contract, 175.
Or where is continuous under Act of 1855, 175, &c.

GAS FITTER
Has the lien, 117.

GIVING TIME
To contractor, discharges owner, 190, &c.

GLAZIER
Is mentioned in Act of 1803, 113.

GRATES.
Those furnishing, have liens, 117.

GRAVEYARD
Is not embraced in lien against church, 146.

GREENE.
Acts extended to, 52.

GROUND.
How much affected, 137, &c.
See Extent.

GUARANTEE
Of third person, does not deprive of lien, 121.

HARRISBURG.
Acts extended to, 48.

HIRING
By the day does not forbid lien, 80.

HISTORY.
No precedent for the system, here or in England, 33.
Similarity of Act of 1784, as to work on vessels, 33.
Origin of mechanics' lien law, doubtful, 33.
Long continued regard for mechanics, 34.
Losses by contractors led to the Acts, 34.
Early defects of the system, 34, 35.
Act of 1836, most perfect, 35.
Change by Act of 1840, as to the estate affected, 35.
Change by Act of 1845, as to cases of a contract, 35, 36.
Our system adopted by Congress, &c., 36.
System has extended over most of our own state, 36.

HOD CARRIER
Has no lien, 76.

HOISTING GEARING
About mills, iron and coal mines, and works, within Acts, 87.

HUNTINGTON.
Acts extended to, 50.

ICE HOUSE.
Semble, not within Acts, 85.
Contra, 97.
Is, if attached to main house, 89, 101.

IMPROVEMENTS
On coal lease estates, Acts extended to, 55.

INDIANA.
Acts extended to, 55.

IN PERSONAM.
Not a proceeding, 164, 200.
See Personal Remedy.

IN REM.
Strictly a proceeding, 164, 200.

INSURANCE COMPANY.
Building by, under policy, not within Acts, 130, 159.

IRON MINES.
Acts extended to fixtures and machinery of, 87.

IRON MONGER
Is mentioned in Act of 1803, 113.

IRON WORKS.
Acts extended to fixtures of, 55, 87.

IRREGULARITIES
In proceedings, when cured by judgment, 298.

ISSUE
Under proceedings to compel claimant to go on, 268.
Will be directed, if necessary, in distribution, 306.

JEFFERSON.
Acts extended to, 53.

JOINT CLAIMS
Cannot be filed against houses owned by different persons, 249, 255.
May be filed where houses owned by one person, 249.
Held, *contra*, formerly, 249.
Allowed to be apportioned by Acts of 1831 and 1836, 252.
Should aver joint ownership, 253, 259.
First Acts in regard to, applied only to materials, 254.
Act of 1850 allows in case of work, 254.
Houses must adjoin to allow of, 256, &c.
Act as to, does not apply to main house and out-houses, 258.
Should aver that houses adjoin, 259.
Effect of change of ownership as to, 259.
If no apportionment in, claimant postponed, 259.

JOURNEYMAN
Has no lien, 76.

JUDGMENT.
Entering a, does not prevent lien, 121.
Nor does taking, discharge lien, 189.
For want of affidavit of defence, 272.
No copy filed for, 272.
Effect of, 298.

JUDGMENT—*Continued.*
Protects from certain objections, 305.
But before, other creditors may object to claim, &c., 305.

JUDICIAL EXPOSITION.
Effect of, 44, &c.

JUNIATA.
Acts extended to, 50.

JURISDICTION
Of courts, 202. &c.
In cases of apportionment, 203.

JURY.
Time of finishing work and furnishing materials a question for, 172.
See Law and Fact.

KITCHEN,
Is a building within Acts, 84.

LABOURER.
See Day Labourer.

LANCASTER.
Acts extended to, 48, 49.
Acts extended to plumbers, &c., in, 55.

LAND
Is bound as well as building, 135.
How much, is bound, 137, &c.

LAW AND FACT.
What are questions of, 295.

LAWRENCEVILLE.
Acts extended to, 49.

LEBANON.
Acts extended to, 49.

LEHIGH.
Acts extended to, 52.

LESSEES
Of coal estates, Acts extended to, 55, 87.
For years, no lien against, 87.
With right to buy in fee, have equitable estates, and are within Acts, 94.

LEVY
On term will not pass a fee, 158.

LIEN CREDITORS.
See CREDITORS.

LIFE ESTATE.
Tenant of, could bind reversioner, 128.
And remainder-men, 128.
Not since Act of 1840, 128.

LIME MERCHANT
Is mentioned in Acts of 1803 and 1806, 113.

LOCALITY
Of building, how averred in claim, 240, &c.
See CLAIM.

LOT.
See LAND.

LUMBER MERCHANT
Is mentioned in Acts of 1803 and 1806, 113.

LUZERNE.
Acts extended to, 50.

LYCOMING,
Acts extended to, 50.

MACHINERY.
Acts extended to, of coal lease estates, 55.
About mills, iron or coal mines or works, 87.

MARIETTA.
Acts extended to, 48.

MASON
Is mentioned in Acts of 1803 and 1806, 113.

MASTER MECHANIC, OR MATERIAL MAN
Has a lien, 75.
Hard to distinguish them from subordinates, who have no lien, 75.
Payment by the day to, no test, 75, 76.

MATERIALS
Need not be used, 117, &c., 131.
Are they bound if not used? 131, 132, 133.
How levied on, 133.

MATERIAL MAN
Need not be a regular tradesman, 81, &c.

MECHANICS
Need not be in regular employment to have lien, 84.

MERCER.
Acts extended to, 50.

METES AND BOUNDS
Of land bound by lien, how ascertained, 144.
Latitude allowed as to, 149.
Need not be stated in claim, 240.
But better to state them, 241.

MIDDLE MAN.
See Contractor.

MIFFLIN.
Acts extended to, 50.

MILLS.
Are buildings, within the Acts, 84.
Acts extended to, of all kinds, 87.

MILLSTONES
Are within Acts, 96.

MINES.
Acts extended to, 55.

MISTAKE
In parties, when fatal, 207, 208, 212.
How far, helped by proof, 281, &c.

M'KEAN.
Acts extended to, 52.

MONTGOMERY.
Acts extended to, 49.

MORTGAGEE.
May come in and take defence, 217.
See Purchaser.

MOTION
To strike off, 260.
Favoured, 260.

MUNICIPAL LIENS.
Resemblance of, to mechanics' liens, 163.

NON ASSUMPSIT
Is, frequent plea, 276.
Bad, in case of special contract, 276.

NON JOINDER
Of one contractor, is matter in abatement, 206, 274.

NONSUIT.
See case of new *scire facias* after, 264.
Cannot be suffered, after proceeding to compel claimant to go on, 268.

NORTHAMPTON.
Acts extended to, 50, 53, 54.

NORTHERN LIBERTIES
Are embraced by Act of 1803, 41.

NORTHUMBERLAND.
Acts extended to, 49.

NOTE.
Taking does not prevent claim, 121.
Does not discharge lien, 189.

NOTICE.
None of lien, until claim filed, 163.
Except from house, 164.
See SERVICE.

"NUL TIEL RECORD"
Is a bad plea, 275.

ODD FELLOWS' LODGE,
A building within the Acts, 85.

ORDER.
Form of, in compelling claimant to proceed, 268.

ORIGIN.
See HISTORY.

ORIGINAL ENTRIES,
Best proof of credit to building, 280, &c.

OUT-HOUSES.
What are, within Acts, 85.
No apportionment as to, 258.

OWNER
Has no lien against creditors, 58, 59.
May purchase a lien, 60.
By Act of 1803, contract must have been with, 125.
Whether contractor is agent of, 125.
Is surety for contractor, 191.

OWNER—*Continued.*
Not bound, personally, 200.
Bound if he is contractor, 200.
At commencement, sufficient for claim, 214, 224.
At time work done, or claim filed, also proper, 216, 224.
Title of, as such, not necessary, 224.
Is not a witness for co-owner, 293.
Unless at trial, he has ceased to be such, 293.
See PARTIES.
See CLAIM.

OWNERSHIP.
Change of, does not make new commencement, 166.
Contra, in case of Sheriff's sale, 168.
Effect of different, on right to apportion, 249, &c.
Effect of change of, 259.

PAINTER
Is mentioned in Act of 1803, 113.

PAPER HANGER
Is not within early Acts, 113.
Is within Act of 1836, 115.

PARTNERS
Taken subsequently to contract, not proper claimants, 204.
Firm name of, sufficient, 224.
Or individual names of, only, 224.

PARTY.
Who must be, 204, &c.
Claimant must be, 204, 223.
To claim and *scire facias*, 205.
Whether owner and contractor must be, 205, &c.
Semble, they need not have been, to claim under early Acts, 205, 210.
But in practice they were, 207.
And under Act of 1836, must be, 208, 212.
Mistake as to, in claim, 207.
To *scire facias*, contractor must be, 207, &c.
And owner, where he is contractor, 208, &c.
How, where owner not contractor, 210, &c.
Owner or reputed owner is, 210.
Act of 1836 requires him to be, 211.
Reputed owner, where owner not known, 212.
If named and mistake in, 212.
If wrong named defence may be made, 213.
Importance of correctness as to, in case of apportionment, 214.

PARTY—*Continued.*
Owner when building commenced, is proper, 214, &c.
Semble owner, when work done or materials furnished, 216, &c.
Mortgagees may come in as, 217.
See EVIDENCE.

PAVEMENT.
Curbstones for, within Acts, 101.

PAYMENT.
Mode of, no test of right of lien, 80, &c.
By the day does not prove the subordinate, 80, &c.
In lumber, does not affect right to lien, 121, 124.
Appropriation of, 193, &c.
Usual plea, 276.
Effect of plea of, 278.

PERRY.
Acts extended to, 50.

PERSONAL REMEDY.
Act of 1836, as to, 312.
Lien does not stand in way of, 312.
None against owner, unless he is contractor, 312.

PERSONALTY.
If an estate be, not within Acts, 87.

PETITION
To strike off claim, 260.
To compel claimant to proceed, 268.

PHILADELPHIA.
Act of 1803, confined to, &c., 48.
Act of 1806 embraced, 48.
Law to apply to plumbers, &c., in, 54.
Mechanics in may include both work and materials, 55.

PIKE.
Acts extended to, 53.

PITTSBURGH.
Acts extended to, 48.

PLASTERER
Is mentioned in Act of 1803, 113.

PLEADINGS
Under proceedings to compel claimant to go on, 268.
Scire facias, is declaration, 274.

PLEADINGS—*Continued.*
Non-joinder of one of two contractors, matter of abatement, 209, 274.
Demurrer allowed to claim, 274.
"No lien" bad, 274.
"*Nul tiel record*," bad, 275.
Semble demurrer for variance between *scire facias* and claim is good, 275.
Usual, on non *assumpsit*, payment, set off, &c., 276.
Non *assumpsit* bad, in case of specialty, 276.
Special pleas common, 276.
Instances of, 275, 277, 278.
Payment, effect of, 278.
Contractor may plead set off, 278.
Former recovery, 278.

PLEDGE.
Who may, the building, 125, &c.

PLUMBERS.
Acts extended to, in Philadelphia and Chester, 54.
And in Lancaster, 55.
Held not within early Acts, 113.
Act of 1831, as to, in Philadelphia, 115.
Act of 1836, as to, 116.

POLICY
Of system doubtful, 36.

POSTPONEMENT
By failure to apportion, 185.
Is to all liens, in such case, 185.

POTTER.
Acts extended to, 53.

PRESUMPTION
In favour of proceedings after verdict and judgment, 297.

PRINCIPAL
Only of each trade, has lien, 76, &c.
Not subordinates, 76, &c.

PRIORITY
Of lien, 184.
Lien has, over judgment, even for purchase money, if not entered. 184.
Lien has, over all others after commencement, 154.

PRIVY
Not within Acts, 85.
Contra, 99.

PROCEEDS
Of Sheriff's sale, claim need not be filed against, 182, 183.
Liens payable out of, 187.

PRO RATA.
Contractor cannot divide, with mechanics, 70.
Creditor paid, if not enough for all, 185.

PUBLIC BUILDINGS
Not subject to lien, 86.

PUMP GEARING
About mills, iron or coal works or mines, within Acts, 87.

PURCHASERS
Should be protected by form of claim, 39.
Retroactive effect of Act of 1845 as to, 46.
Should inquire for liens, if house newly erected, 164.

READING.
Acts extended to, 49.

RECORD.
Claim is not, 221.

RELATION BACK.
Lien has, to commencement, 185.
Where owner of equity acquires legal estate, 184.

RELEASE
Discharges lien, 188.

REMEDY
Alone affected by Act of 1840, 42, &c.

REPAIR.
When work is only, 101, &c.

REPUTED OWNER.
See PARTY.

RETROSPECTIVE ACTS.
See ACTS OF ASSEMBLY, 40, &c.

REVERSIONERS.
Estates of, bound, under early Acts, 128.
Not since Act of 1840, 128.

ROPE WALK.
Claim filed against, 97.

SALE
Discharges mechanic's liens, 301.
See SHERIFF'S SALE.

SAW-MILL.
Steam engine in, is within Acts, 96.
What ground is appurtenant to, 146.

SCHOOL HOUSE
Is a building within the Acts, 84.

SCHUYLKILL.
Acts extended to, 50.
Improvements on coal lease estates in, 55.

SCIRE FACIAS.
Claim revived by, 183.
Early Acts as to, 262.
Form of, given in Act of 1836, 262.
Several, in case of apportionment, 263.
Parties to, 263.
Service of, 264, &c.
Is sufficient declaration, 274.
See PARTY.

SERVICE
Of *scire facias*, 264, &c.

SET OFF.
Debt due to contractor may be, 193.
Usual plea, 276.
Contractor may plead, 278.

SHERIFF'S SALE.
Effect of, to make a new commencement, 169.
Necessity of filing a claim after, 182.
Does six months run against proceeds of?, 182.
Discharges liens, 187, 197, 301.
Unless otherwise agreed, 302.
Stops all further proceedings, 302.
Quere, if defective title sold, 308.
Does not affect adverse title, 303.
Exemption Act, does not apply, in case of, 303.

SIX MONTHS.
When begin to run, 172, &c.

SIX MONTHS—*Continued.*
Is question of fact, 172.
See CONTINUANCE.

SMOKE HOUSE.
Semble not within Acts, 85.

SOMERSET.
Acts extended to, 50.

SOUTHWARK
Is embraced by Act of 1803, 48.

SPECIAL CONTRACT
Effect of, on right to a lien, 120.
Held, at first, did not prevent lien, 120.
Contra, afterwards, 122.
Then Act of 1845, 123.

STABLE.
Semble, not within Acts, 85.
Contra, 97.

STATEMENT
Required under proceedings to compel claimant to proceed, 268.

STEAMBOAT
Not within Acts, 95.

STEAM ENGINE
About mills, iron or coal works or mines, within Acts, 87.
To propel saw-mill, held within Acts, 96.

STONECUTTER
Mentioned in Act of 1803, 113.

STORE
Is a building within the Acts, 84.

STORIES.
Number of, how stated in claim, 215.

STRIKING OFF
Claims, 260.
How done, 260.
Saves costs, &c., 260, &c.

SUB-CONTRACTOR
Has been held to have no lien, 68, &c.
Contra, by Act of 1845, 69.

SUB-CONTRACTOR—*Continued.*
Right, as against owner, restrained by chief contract, 72.
Is "substitutionary" to contractor, 73.
Does Act of 1845 apply to, 124.
Can pledge credit of building, 125, &c.
See CONTRACTOR.

SUBJECT
Of the lien, 131, &c.

SUBORDINATES
Have no lien, 76, &c.

SUGGESTION.
Coming in by, 270.
Mode of, 271

SUMMONS.
Scire facias, served like, 264.

SURETY.
Owner is for contractor, 191.

SUSQUEHANNA.
Acts extended to, 50.

SYDNEYVILLE.
Acts extended to, 49.

TAN-HOUSE
Is a building within Acts, 84.

TEARING DOWN
House does not discharge lien, 197.

TENANT FOR LIFE.
See LIFE ESTATE.

TENANT
Of coal lease estates, Acts extended to, 55.
See ESTATE.

TEN PIN ALLEY
Is within Acts, 100.

THEATRE
Is a building within the Acts, 84.
Stage and scenery of, 96.

TIME.
With reference to, whether work is done in erecting and constructing, 111.

TIME—*Continued.*
What length of, allowed after main work, 111.
Statement of, in claim, 228, &c.

TIOGA.
Acts extended to, 50.

TOWNS
Near Pittsburgh, Acts extended to, 49.

TRADE.
Need not have regular trade to be within Acts, 81, 82.

TRESPASSER.
Building by, not within Acts, 129, 159.

TRIAL.
See Evidence.
See Nonsuit.

UNION.
Acts extended to, 50.

USE
Of materials, not necessary to give lien, 117, &c.

VARIANCE.
Demurrer for, between *scire facias*, and claim, 275.
Between *allegata* and *probata*, 280.

VENANGO.
Acts extended to, 50.

VERDICT
Does not find commencement of building, 297.
Certificate for defendant in, not allowed, 297.
Effect of, 297.

WAGON SHED
Is within Acts, 97.

WARE HOUSE
Is within Acts, 84.

WARREN.
Acts extended to, 50.

WASH HOUSE
Is within Acts, 79.
When? 99.

WASHINGTON.
Acts extended to, 50.

WAYNE.
Acts extended to, 52.

WEST CHESTER.
Acts extended to, 49.

WESTMORELAND.
Acts extended to, 53.

WHARF BUILDERS
Are within Acts, 86.

WILKINSBURGH.
Acts extended to, 46.

WITNESS.
Contractor is not, for owner, 292.
Effect of release upon, 293.
Contractor is, for claimant, 293.
And before Auditor, 293.
Owner not, for co-owner, 293.
Owner, at trial, not for owner when claim filed, 293.
Owner before may be, if not at trial, 293, 4.

WOOD HOUSE
Is within Acts, 97, 99.

WORKMEN.
Subordinate, have no lien, 76, &c.

YORK.
Acts extended to, 49.

THE END.

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